No. 12163

United States Court of Appeals

For the Ninth Circuit

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DANEBO LUMBER COMPANY, INC., a Corporation, and MARK C. STORMS, Individually,

Appellants,

vs.

KOUTSKY-BRENNAN-VANA COMPANY, a Corporation,

Appellee,

and

KOUTSKY-BRENNAN-VANA COMPANY, a Corporation,

Cross-Appellant,

vs.

DANEBO LUMBER COMPANY, INC., a Corporation, and MARK C. STORMS, Individually,

Cross-Appellees.

o———o———o

Upon Appeal from the United States District Court for the District of Oregon

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BRIEF OF APPELLEE AND CROSS-APPELLANT KOUTSKY-BRENNAN-VANA COMPANY, A CORPORATION

o———o———o

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Law Briefs—OMAHA LINO-SLUG PRINTING CO.—418 South 15th Street

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ISSUES INVOLVED

The contentions of parties are sufficiently set out in appellants' brief and in the pre-trial order, beginning page 14 through to page 38, so that appellee deems it unnecessary to repeat the statements here. We proceed,

therefore, to answer the contentions of appellants without encumbering the record with too much repetition.

Questions Raised by Appellants

The appellants, on page 11 of their brief, set out three principal propositions or questions involved in this appeal:

> "1. It is an inflexible prerequisite to the maintenance of a suit in equity that the plaintiff (appellee) come into court with clean hands. The complaint and *all evidence admitted in support thereof* conclusively show that the plaintiff (appellee) is not in court with clean hands with respect to the matters upon which it seeks relief.
>
> "2. The complaint and the *evidence introduced in support thereof* conclusively show that the cause of action grows out of, and is based upon an unlawful and illegal conduct knowingly and deliberately entered into for and in pursuance of an unlawful and illegal purpose in direct violation of the Emergency Price Control Act of 1942 as amended. Hence the plaintiff has no other standing either in a court of equity or a court of law.
>
> "3. There is no competent evidence to establish the averment that said option given by the appellant Storms to the plaintiff (appellee) was a sham or other than what it purports to be, nor is there any competent evidence to show that either the appellant Danebo Lumber Company, or the appellant Storms violated the OPA regulations or violated the Emergency Price Control Act of 1942 as amended or otherwise entered into any unlawful agreement or conspiracy. Therefore, the judgment is not supported by the evidence and is contrary thereto."

On page 12 they set out their specification of errors which are practically the same as their propositions of law.

On page 13 they set out what they claim is the findings of fact by the Court.

That finding of fact is not complete and shows on its face that it was just supplementing the brief statement which the Court made at the end of the trial.

That statement at the end of the trial is found at the bottom of page 142 of the transcript of the record and is as follows:

> "The Court: My holding will be this—I will amplify these findings at an appropriate time.
>
> "This was a conspiracy which all the parties engaged in, the buyers and the sellers, to violate and evade the Price Control Act and appropriate regulations thereunder; and I feel under the circumstances of the case, that the plaintiff is entitled to recover against the Lumber Company, defendant, and as against Storms, defendant. As to that, I will file a written memorandum later, but generally speaking, it is on the theory of money had and received and unjust enrichment."

At the bottom of page 13 of appellants brief they had a fourth error claiming that the Court erred in not rendering judgment in favor of the plaintiff-appellee and against the appellants for the reason that said judgment is not supported or justified by the evidence and is contrary thereto. Then follows the argument.

Before answering appellants' argument we pause at this time to call the Court's attention to the fact that although the appellants in the District Court designated for appeal the complete record, including everything that occurred during the trial, in their designation in the Court of Appeals they only designated part of the record, and did not print all of the evidence, exhibits, or depositions

taken prior to the final hearing, which was on June 1, 1948. This statement is clearly shown by the certificate of the Clerk of the District Court, which is found on pages 44 and 45 of the transcript of the record. There the Clerk certifies that he has enclosed under separate cover a duplicate transcript of proceedings of June 1, 1948, together with the depositions of Jack A. Cooper, et al., and deposition of Charles M. Kincaide, Jr., also Exhibits 1 to 13, inclusive, 13-A and 14 to 25, inclusive, also proposed pre-trial order.

In the transcript that appellants had printed in this Court they omitted all the depositions of Cooper, et al., the deposition of Charles M. Kincaide, Jr., and all the exhibits except 1, 2 and 3. Therefore the complete record is not set out in the transcript, and it is our contention that appellants cannot under this state of the record raise the question that the findings of fact are not supported or justified by the evidence, and is contrary thereto. We will discuss this question when we reach that part of the argument in which they claim the right to review the findings of fact as not supported by the evidence.

Appellants' Statement of the Case

There was a pre-trial conference had in this case before Judge Fee and a pre-trial order prepared under his direction, but it was never signed by Judge Fee. When the case came up for trial it was heard before Judge McColloch and said pre-trial order that was prepared was signed by all the parties but was not signed by any Judge, but it was received in evidence at the trial by Judge McColloch as a stipulation or agreed statement of facts.

It is found in the transcript of record beginning at page 11 and ending at page 44. In that agreed statement

of facts it is admitted (page 15 of the record) that the plaintiff issued its check to the defendant Mark C. Storms, dated July 20, 1946, in the amount of $15,000.00, and delivered said check to the defendant Charles M. Kincaide, Jr., and the said Charles M. Kincaide, Jr., thereafter delivered said check to the defendant Mark C. Storms, and the said Mark C. Storms thereafter endorsed said check to the defendant Danebo Lumber Company. That the Danebo Lumber Company received the money on said check. That no lumber shipments were made and no lumber sold by the Danebo Lumber Company to the plaintiff. That the defendant Danebo Lumber Company and Mark C. Storms refused to return said $15,000.00 or any part thereof, although so demanded by the plaintiff. That the plaintiff's pre-trial Exhibit 1 is an agreement dated September, 1946, entered into between the defendant Danebo Lumber Company and the defendant Charles M. Kincaide, Jr. That the $15,000.00 check given by the plaintiff to Kincaide was delivered in Omaha, Nebraska, on July 20, 1946, and that the option agreement dated August 29, 1946, plaintiff's pre-trial Exhibit 2, was received by plaintiff through the mail from Kincaide. That the Danebo Lumber Company a corporation, was chartered on August 15, 1946, with an authorized capital of $150,000.00, composed of 1,500 shares of common stock of $100.00 each. That Mark C. Storms was and is the president of the company, and John C. Willener was and is the vice-president and manager and that John J. Gregory was and is secretary-treasurer, and that the above named are the directors of the corporation and all the stockholders thereof. That all these Danebo Stock options were similar in form as the option that was introduced in evidence here, and that Mr. Seitz, attorney for the defendant-respondent, Storms, and Danebo Lumber Company, Inc., drew all of them similar in form. Exhibit 7

was a similar option agreement given by John C. Willener to A. F. Christensen dated August 29, 1946, and that at the same time John J. Gregory gave an option to the Farmers Co-Operative Union of Oakland, Nebraska, for ninety (90) shares of stock of the Danebo Lumber Company, Inc. That John J. Gregory gave an option to Charles M. Kincaide, one of the defendants-respondents in this cause, for fourteen (14) shares of stock of the Danebo Lumber Company, Inc. And John J. Gregory gave an option to the Landy-Clark Lumber Company of Lincoln, Nebraska, for ninety (90) shares of the Danebo Lumber Company, Inc., stock. And John J. Gregory gave to F. O. Akin an option for ninety (90) shares of stock of the Danebo Lumber Company, Inc. That Mark C. Storms gave an option to Charles M. Kincaide, Jr., defendant-respondent herein, for sixty-two (62) shares of stock of the Danebo Lumber Company, Inc. That Mark C. Storms gave an option to the Hoppe Lumber Company, of Lincoln, Nebraska, for one hundred fifty (150) shares of stock of the Danebo Lumber Company, Inc. That Mark C. Storms gave an option to the Harberg Lumber Company of Papillion, Nebraska, for one hundred fifty (150) shares of stock of the Danebo Lumber Company, Inc. That John C. Willener gave an option to A. F. Christensen Lumber Company of Fremont, Nebraska, for ninety (90) shares of stock of the Danebo Lumber Company, Inc. That John C. Willener gave an option to Searle & Chapin Lumber Company of Lincoln, Nebraska, an option for ninety (90) shares of stock of the Danebo Lumber Company, Inc. And John C. Wilener gave an option to Charles M. Kincaide for fourteen (14) shares of stock of the Danebo Lumber Company, Inc. All options were given for the same amount per share, $250.00 per share, all Danebo Lumber Company, Inc., stock, and there was a

total of 1,420 shares issued and subscribed for, and these options covered all the issued capital stock of the Danebo Lumber Company, Inc. It is admitted that Mr. Kincaide early in the year 1946, probably in June, had a conference with Mr. Storms in Eugene, and at that time Mr. Storms stated to Mr. Kincaide that they were organizing a corporation to construct and operate a saw mill at Danebo Station. That they had the thing partly set up, they expected to incorporate shortly; that they needed additional finances and they said to Kincaide, if you can get these additional finances along the line which you say you can, namely, through options on stock of the new corporation; if you can get someone to take options on this stock, we will tie up to you a certain percentage of the output of this mill. Mr. Kincaide said he though he could do that. He said he thought he had someone who would be willing to do that. Neither the defendant Storms, nor Danebo Lumber Company, knew whom Mr. Kincaide had contacted, nor did they know whom he intended to contact, if anyone. But it later developed that in July Mr. Kincaide in the meantime had been to Omaha or in the East and came back and stated that he had the money, and that he had, among others, this $15,000.00 check of plaintiff's. When Kincaide got back he contacted Mr. Storms and told him he was ready to take an option, so Mr. Kincaide and Mr. Storms got together. At that time the corporation, Danebo Lumber Company, had not been organized. After all that had been done, Mr. Storms and Mr. Kincaide got together and drew the option. When the option was signed and delivered to Mr. Kincaide, Mr. Kincaide delivered the check to Mr. Storms. Mr. Storms endorsed the check. At the same time the contract, plaintiff's pre-trial Exhibit I, was executed between Danebo Lumber Company and Mr. Kincaide.

It is further agreed that the Court shall take judicial notice of the Emergency Price Control Acts and all Rules and Regulations in force during the period of this controversy.

Contentions of Plaintiff

It is the contention of the plaintiff-complainant that it was in the retail lumber business in the city of Omaha, Douglas County, Nebraska, and was unable to get lumber from the wholesalers or from the mills at what was then the O. P. A. ceiling price. That they were compelled in order to do business at all as a going concern to agree to pay more than the ceiling price in order to get lumber.

That the defendant-respondent, Charles M. Kincaide, Jr., was a wholesaler engaged in the selling of lumber wholesale, and was also a mill representative and held himself out as representing certain mills which were engaged in the manufacture of lumber. That he and defendant-respondent, Mark C. Storms, had entered into a tentative plan whereby they were to try to get retail lumber companies like plaintiff-complainant to advance money for the purpose of getting lumber, and that pursuant to said tentative agreement said Kincaide, representing himself and acting as agent for Mark C. Storms' interest, came to Omaha and contacted the plaintiff-complainant and other retail lumber dealers in Nebraska and elsewhere, and the said Kincaide and the plaintiff-complainant represented by Mr. George Vana entered into an agreement whereby said Vana was to advance the sum of $15,000.00 for the purpose of getting lumber over the ceiling price, and under said agreement said lumber when sold or purchased was to be invoiced at the then prevailing O. P. A. ceiling price, but there should be added to that the sum of $10.00 per 1,000 feet of lumber, said excess to

be taken out of said money advanced until said advanced payment was exhausted.

That it was further part of said agreement that in the event the O. P. A. should go off then the lumber should be furnished at the then pervailing market price as established by the Weyerhauser interests and the Long-Bell Lumber Company interests, and the lumber should be invoiced at $10.00 *under* the market price, and the additional $10.00 per 1,000 feet should be deducted from the moneys advanced until said money should be used up.

In the event that the advanced payments were not all used up in this matter, the remainder of said advance payments should be refunded to the plaintiff-complainant. That this was a common scheme or plan devised by defendants-respondents to evade the O. P. A. regulations. That the same plan had been previously used in similar transactions. That the sum of $15,000.00 was advanced on this agreement, but no lumber was ever delivered, although repeated demands were made therefor. That as part of said scheme to evade the O. P. A. regulations an option agreement was to be given to the plaintiff-complainant, represented by Mr. George Vana, who entered into an agreement whereby said Vana was to advance the sum of $15,000.00 for the purpose of getting lumber over the ceiling price, and under said agreement said lumber when sold or purchased was to be invoiced at the then prevailing O. P. A. ceiling price, but that there should be added to that the sum of $10.00 per 1,000 feet of lumber, said excess to be taken out of said money advanced until said advanced payment was exhausted.

That as part of said scheme to evade O. P. A. regulations an option agreement was to be given to the plaintiff-

complainant to purchase stock, but the name of the mill was not given, and the amount advanced was purported to be the payment for said option, but that this was not to be enforced; that it was a sham-contract devised by the defendants, Mark C. Storms and Charles M. Kincaide, Jr., for the purpose of covering up the illegality of the transaction under the O. P. A. regulation, and was never to be exercised. That the lumber was to be delivered within 90 days of said payment of said money and these payments were advanced by check by the plaintiff-complainant in the sum of $15,000.00 on July 20, 1946.

That this plaintiff-complainant brought this action to rescind and cancel said so-called agreement and is asking that the money be refunded to them on the theory that this is purely an executory contract as far as plaintiff-complainant is concerned.

It is the further contention that the money advanced went to the Danebo Lumber Company and they still have the money and refuse to refund it.

It is plaintiff-complainant's further contention that Kincaide acted as the agent of said Mark C. Storms, and the Danebo Lumber Company was supposed to be later organized as a corporation and that Kincaide, Jr., was the agent of said defendant-respondent, Mark C. Storms, and the supposed Danebo Lumber Company, and if he was not their agent and unauthorized to make the agreement that they made with plaintiff-complainant defendants-respondents cannot receive the benefits of the agreement as made by Kincaide, and not assume the burden, and if the defendant-respondent, Storms, and Danebo and Kincaide received the plaintiff-complainant's money they would have no right if the agent acted beyond his author-

ity to hold the money and they should refund it to the plaintiff-complainant.

It is the plaintiff-complainant's further contention that no dealings or agreements were had directly between the plaintiffs and the Danebo Lumber Company, Inc., defendants herein, nor Mark C. Storms, defendant herein, and whatever dealings or agreements were made between the parties were handled by the defendant, Charles M. Kincaide, Jr.

Defendants' Contentions

The defendants deny the contentions of the plaintiff and assert:

That in the matter involved in this action the defendant, Charles M. Kincaide, Jr., was not the agent or representative in any way of either the Danebo Lumber Company or Mark C. Storms. That the defendant, Charles M. Kincaide, Jr., delivered said $15,000.00 check payable to Mark C. Storms to Mark C. Storms when and only when said Mark C. Storms executed and delivered the option (pre-trial Exhibit 2) to the defendant, Charles M. Kincaide, Jr., and that thereafter the said Charles M. Kincaide, Jr., delivered said option to the plaintiff. That the said option (pre-trial Exhibit 2) was not intended as a sham agreement, but was and is a valid, binding agreement which is and at all times has been in force and which the plaintiff has the right to exercise. That the understanding between the defendant, Storms, and the plaintiff was in accordance with said option (pre-trial Exhibit 3), and no further, different or other agreement of any kind was entered into or intended.

That the agreement entered into between said defendant, Charles M. Kincaide, Jr., and the defendant, Danebo

Lumber Company (plaintiff's pre-trial Exhibit 1) is and was intended to be a valid, binding agreement, and that the defendant, Danebo Lumber Company, is now and at all times has been ready, able and willing to perform said contract on its part to be performed.

The Issues of Law Contended by Defendants

The defendants, Danebo Lumber Company, Mark C. Storms and Charles M. Kincaide, Jr., submit:

1. That the plaintiff is not entitled to recover under the allegations of its complaint for the reasons (1) that the whole transaction as alleged and upon which the plaintiff relies was and is for the purpose of procuring lumber at prices in excess of the ceiling established by the Office of Price Administration and for that reason illegal and unlawful; (2) that the plaintiff at the time of entering into the arrangement or agreement upon which the cause of action is based knew that said agreement or arrangement was illegal, in violation of law, and it was done with a deliberate and considered purpose. Therefore, the plaintiff is not in Court with clean hands and is not entitled to any relief whatsoever.

Issues of Law Contended by Plaintiff-Complainant

1. It is the plaintiff-complainant's contention that they have the right to show that the agreement herein entered into was similar to previous agreements that had been entered into between the parties and other retail lumber companies, and that it was part of a general scheme devised by defendants-respondents to obtain lumber in excess of ceiling prices, and the general plan can be shown by similar transactions with other dealers.

2. That the plaintiff-complainant has the right to show by parol evidence that these contracts, although

apparently valid on their face, were entered into as sham contracts, and that they were entered into for another purpose even though that purpose was an illegal one.

3. That we have the right to show by parol evidence that this contract, although apparently valid on its face, was part of a larger agreement, and that the whole contract was partly in writing and partly oral, and that it was the intention of the parties that the contract should not be exercised and was a mere cover-up or sham to evade the O. P. A. regulation.

4. That under said circumstances, when the proof shows that the agreement, although illegal, is still executory, and is not "malum per se" but only "malum prohibitum," and the money is paid down on such an agreement, that the party paying down the money may bring an action, as this was brought, and set up the illegal agreement and recover the money from the persons to whom it was paid, or who received it under said illegal agreement upon two (2) theories:

(1) On the theory that the plaintiff-complainant, who was a retail lumber man, was not in pari delicto with the wholesaler or mills, defendants-respondents herein, in that they were willing to deal, if possible, under O. P. A. regulations, but that the defendants-respondents refused to furnish lumber at O. P. A. prices and, therefore, the parties not being equally guilty, the Court will aid the one less guilty in recovering his money back, and cancelling the contract.

(2) That even though the Court should find that the parties are equally guilty but still the transaction is only malum prohibitum and the contract is still executory, the party to the contract who pays the money under said il-

legal agreement has the right to go into equity and cancel or rescind the contract and recover the money paid, on the theory that while the contract is illegal public policy is better conserved by allowing recovery of the money than by permitting the other party to retain an unjust enrichment. (See pre-trial Order and Stimplation, pages 14 to 34, Record).

On page 47 of the Transcript of the Record it appears that all of these exhibits that were identified at the pre-trial conference were offered and received in evidence and also all depositions of the various witnesses taken in Omaha now on file. (See also bottom of page 48, Transcript of the Record, that the Court received both the exhibits and the depositions.) At pages 49 to 52 these exhibits and depositions are shown in detail.

ADDITIONAL TESTIMONY TAKEN AT THE HEARING BEFORE JUDGE McCOLLOCH

George J. Vana, General Manager of the plaintiff, was called as a witness on behalf of plaintiff and his testimony is set out in question and answer form, beginning at page 54 of the Transcript of the Record, and he testified that in 1945 and 1946 and possibly a little previous to that time, it was almost next to impossible to get lumber in the regular way and through regular channels under O. P. A. prices. It always meant that you had to engage in some sort of a proposition whereby you could get this lumber in order to keep in business. (Bottom of page 55.) That he had an overhead to maintain and he tried to keep business going and it was very difficult *because it was next to impossible to get lumber in the regular channels. He was willing at that time to buy lumber, if he could, at O. P. A. ceiling prices.* (Page 56.) He met Kincaide at about that time and had considerable dealings

with him as a lumber broker. On April 4, 1946, Kincaide came to his office with a proposition about buying lumber over the O. P. A. ceiling. *At that time it was next to impossible unless you engaged in some sort of a proposition in order to obtain it,* so Mr. Kincaide said he had a deal whereby, if we would put up $7,000.00, we could get a certain amount of lumber at over the O. P. A. ceiling, for a certain length of time, so he explained the situation to me and he said that we were to put up $7,000.00 and later on we would get some sort of an instrument; that this instrument would not represent anything at all; it would be *just sort of a sham;* that the real contract would be what he and I agreed upon, or agreed in substance, something like that.

I gave him the $7,000.00. Then they were to start shipping us lumber within a couple of weeks at a certain rate and the prices we were to pay over and above the O. P. A. ceiling was $10.00 for common lumber and $20.00 for what we called the better grades of material, kiln dried (bottom, page 57).

Witness gave Kincaide a check payable to Peter Walton (bottom, page 58) and Kincaide said that I should give him this check for $7,000.00, which was to buy certain amount of lumber at over the O. P. A. ceiling rate, and that Mr. Walton would give us a purported option or something, some sort of an instrument which we were supposed to keep in our files in the event, Mr. Kincaide said, somebody would come along to check up, so we could show that we had this thing, but he said that would only be a sham, it would not be the real intention at all; that the real intention was for us to buy lumber at over and above the O. P. A. ceiling, at $10.00 and $20.00 a thousand above O. P. A. ceiling; for any thousand feet of lumber we would

get they would take $10.00 out of the $7,000.00 for common and for every thousand feet of finished lumber they were to take $20.00 a thousand until this $7,000.00 was used up. This lumber they were buying was to be invoiced at O. P. A. ceiling and the $10.00 or $20.00 above was to be taken out of this $7,000.00; witness entered into that kind of a deal with Kincaide. After he signed the check with reference to the Eclipse transaction, witness got what they called an option (p. 59). It was sent through the mail by Kincaide after witness had given him the check. The plaintiff bought lumber and paid the excess over the O. P. A. price, and the excess was taken out of the $7,000.00 check, and the lumber invoiced at O. P. A. price (p. 60). Later when they had a certain amount of lumber shipped Kincaide figured out how much was earned against this $7,000.00, then he came to plaintiff's office to pick up the purported option, and at the same time gave plaintiff a release for that option to indicate that everything was settled up and that it was O. K. But in that purported action they went ahead and sold the mill before some of the people who were in this deal had gotten all their lumber, so there was something coming, some money to come back, and Kincaide gave plaintiff a check for $500.00, and asked him to sign that check for $500.00, and said that he was going to take it along with him, that he was going to give it to some of the other dealers, and then he figured out, after we had gotten our lumber, that we were $42.55 short of the $7,000.00 sufficient to pay for this lumber over the O. P. A. ceiling, so witness gave him this amount in cash, and they settled that transaction (pp. 60 and 61). After this Eclipse deal he had the deal in controversy with Kincaide. This second deal occurred in their office on July 20, 1947 (p. 61). Kincaide brought up the proposition that this Eclipse deal had gone through so wonderfully well and we started to get lumber about

two weeks after the deal was made, and it was completed satisfactory to everybody; that he had another deal along the same line and wanted to know whether we wanted to participate. *Of course it was still hard to get lumber* and we said yes, if we had the same kind of a deal along the same lines the Eclipse deal was made, we would participate (p. 62). This new deal was to cost us $5,000.00 a unit. In other words, if we took three units we would be paying $15,000.00, and we would get a certain amount of lumber for that $15,000.00. We were buying it on the same deal as the Eclipse deal; that we were paying $15,000.00 to get this lumber and then pay $10.00 a thousand over and above ceiling, and that was to be deducted out of the $15,000.00 that we advanced on the contract with Kincaide. It was to be invoiced at O. P. A. ceiling after they took out $10.00 a thousand on this check. The remainder we were to pay for in cash (p. 63). If the O. P. A. went off they were to get lumber at the market prices following the Weyerhaeuser and Long-Bell's market prices as a guide which had been set for us, because they were the leaders in the industry and naturally would have a line of prices which would practically be satisfactory to everybody, and you would not have to pay a lot of fictitious prices for lumber, and Kincaide said if the O. P. A. went off we would use Weyerhaeuser and Long-Bell's prices, and the lumber would be invoiced to us and we would get a credit of $10.00 a thousand over Weyerhaeuser and Long-Bell's prices (p. 64). And if the O. P. A. was off we would take $10.00 a thousand off of Weyerhaeuser and Long-Bell's prices, and they would invoice it for $10.00 less than that until the advance funds were exhausted (p. 65). Then Kincaide said, "Now, of course, you know, like in the Eclipse deal, there will be a purported option set up and you will get one of these for your file, in the event anything comes up and the Government

checks up to find out if there is any violation, and you can show them that you have got this purported option. It is supposed to protect you, but you won't have to pay any attention to that. That thing will be a sham, just a cover-up deal'' (p. 65). Pursuant to that agreement the check was made out for $15,000.00 and Kincaide took it along with him, and he told witness to make it out to Mark C. Storms. He said to make it out that way, just like we did to Peter Walton. Witness never asked him any questions, because the Peter Walton deal went through nicely, and he said this was the same kind of a deal, so I naturally would not ask him any questions about making it out to Storms. Witness had the utmost confidence in Kincaide. They had lots of business transactions before and had gotten along smoothly and had no reason to believe that there would be anything different in this deal, for he told him it was going to be just like the previous one. The lumber was supposed to be shipped ninety days after July 20. Nothing was said about the Danebo Lumber Company at that time (p. 66). Kincaide said that he was going to make similar deals with other retail lumber dealers. Nothing was said as to where the lumber was to come from (p. 66). They got something in legal form like, and witness put it in his file without ever reading it. *That was the sham option that Kincaide had referred to* (Ex. 2, p. 68). When the deal was originally made with Kincaide, nothing was said about the number of shares nor what was the total amount of the option. No investigation was made as to the financial responsibility of the Danebo Lumber Company. They just took Kincaide's word that everything was all right. Never dealt personally with Storms or any officer of the Danebo Lumber Company. Talked to no one but Kincaide (p. 69). And the whole transaction took about thirty minutes. Never received any lumber under the deal, although plaintiff requested lumber accord-

ing to the deal with Kincaide, but they did not produce on that basis. Witness had another deal in September, 1946, referred to as the Douglas Fir Products Company, and that check was made out to Mr. Furrow for $5,400.00. That was September 10, 1946 (Record, p. 70). Plaintiff received a similar option in that deal from Mr. Kincaide, and he dealt with Kincaide only. Never had any dealings with Furrow at all. Furrow's deal was just like the Eclipse and the Danebo and the proposition was to get lumber at over O. P. A. ceiling prices, and it was to be handled on the same basis, the lumber to be invoiced at O. P. A. prices and the excess of $10.00 a thousand feet taken out of the advanced money until exhausted. *Plaintiff never at any time had any purpose to buy stock in any of these concerns, nor did Kincaide offer to sell any stock.* The purpose was for us to give him this money so as to get lumber over the O. P. A. prices, and the options were nothing but a sham. The plaintiff tried to get lumber under the Douglas Fir Company deal, and Kincaide wrote that the market was pretty strong and they would not let loose of the lumber unless we would pay the market price and it was fixed at so high a price that the witness wrote Kincaide and told him that he could buy all the lumber he wanted for a whole lot less, and never received any lumber from any of these deals, and in May, 1947, had a meeting in the Paxton Hotel in Omaha and Mr. Kincaide and several of the retail lumber dealers were present, and the purpose of the meeting was to get an explanation from Kincaide as to how the thing was going. Everybody wanted to get some lumber at the prices agreed upon, but they were unable to do so, and Kincaide told them at the time that it looked like he could not do anything for them and that we would have to pay the market prices and lose the money we had advanced, and those present said there was no use in buying any lumber from these people on that

basis. All present claimed that the purported options they were given were to get lumber over the O. P. A. ceiling and none of them were getting it, and Kincaide got up and solemnly swore before these people that he would swear that these purported options were a sham and that the object of the thing was to get lumber over the O. P. A. ceiling prices, and these options were just to cover up (p. 74). Then he produced for the first time his contract with the Danebo Lumber Company, which is Exhibit 1 in this Record. And it was suggested at that meeting that the retailers were still willing to buy lumber if they could get it at a fair price, and Kincaide was to see what he could do (p. 75). Some of the retailers brought up the proposition they would pay the market prices if they could get $10.00 a thousand credit against the money they advanced on these deals, and Kincaide said the Danebo people would not do that and if the retailers wanted lumber they would have to pay $75.00 or whatever the market price was at the time, and the dealers suggested there was no point in buying lumber at the market and letting him keep the $10.00 a thousand (p. 76), and he was to take it up with these two companies, the said Danebo and Douglas Fir Companies, and they never got a foot of lumber.

On cross-examination (p. 97) witness again stated that it was *next to impossible to get lumber at O. P. A. ceiling prices* and he bought lumber from Kincaide and paid him over O. P. A. prices, because you could not get any lumber unless you paid over O. P. A. ceiling. Witness got reports from about one hundred to two hundred people in the shingle business and that they were buying over O. P. A. and a lot of lumber dealers were doing the same thing, and *you could not stay in business unless you did,* and *witness stated he could not afford to get out of business* (p. 98). You could not get lumber from anywhere in the United States unless you paid over O. P. A. prices (p.

99). The Eclipse deal was the first one that involved option deals (p. 100). Kincaide said he already had the deal made and he was bringing the proposition to the witness, not like he was coming to the witness and then going over and making a deal. The deal was already made and witness understood that the lumber was coming from a certain source (p. 101).

Charles Kincaide was called by the defendant and the Court said to Kincaide: "I think I should give you a special warning before you start to testify. This is a case of a very unusual sort, and I am not going to tolerate what we call hard swearing. You keep that in mind. This is a court of justice and you have just taken an oath to tell the truth, the whole truth and nothing but the truth. Lots of times in the rush of things people forget that they were sworn before they take that chair" (R. p. 104).

Kincaide testified that he was in the wholesale lumber business in 1946 in Portland; that he bought lumber from mills and sold it to the wholesalers and industries (p. 105), and he testified that he was down at Eugene and talked with Mr. Storms. That was at the time *lumber was hard to get,* and it was brought up that they were thinking of building a mill near Eugene, and they wanted some money to finance it. That they needed about $60,000.00, and did witness think he could maybe raise it, and we discussed that we could maybe make out a deal by selling options on stock to raise this money. The mill at that time had not been built, or the Danebo Lumber Company had not been incorporated. Witness told Storms that he though he could find some dealers that would be interested if he could have the output of the mill and they said he could have the output of the mill in a certain quantity. Then he proposed to work up the deal with these dealers

(p. 107). After this conversation he got in contact with Mr. Vana and told Vana that if he purchased an option in one of these $5,000.00 units he would be entitled to receive that amount of lumber. This was to be at ceiling prices as long as O. P. A. was in, and after it went out it would be at the market price. *No lumber was ever shipped* (p. 109). When O. P. A. went off the mill was not yet completed and Kincaide did not get any lumber because the dealers were not willing to pay the market price, and he admitted that he was present at the meeting at the Paxton Hotel, where he said he would see what he could do, but he was unable to do anything (p. 110). He said that he reported back that he had contacted the Danebo people, and they would not agree to the proposals that they had suggested. There were two or three of these proposals. One was that they offered to settle on a basis of 50 per cent of the money back. *He was not sure of that; might be off a little.* The other was that they would take the lumber less $10.00 a thousand. He put these propositions up to Danebo and they were rejected (p. 111).

On cross-examination by Mr. Seitz, who represents Storms and the Danebo Lumber Company, Kincaide stated that the first conversation he had with Storms at Eugene, which led up to the deal, was along in the *spring of 1946,* and that they were talking about *how hard lumber was to get,* and Storms said that they intended to organize a new mill down at the Danebo Station and that they needed additional financing to build and equip a mill, and witness offered to see if he could get dealers interested (p. 112) and he went back to Omaha and, among others, talked to Mr. Vana, and he reported back that he had gotten dealers interested and had the money, and that it was Kincaide and Storms that agreed upon the options (p.

113), and he was asked if the amount of the options was suggested by Kincaide in order to dovetail in with his arrangement back in Omaha, and Kincaide said it was suggested by you (referring to Seitz) or Mr. Storms, and then he said it was suggested by Storms; and the options were finally drawn up on the 29th of August and delivered (p. 114), and during all of that time witness retained possession of all these checks, including the one given by Vana. He was then asked if he ever ordered any lumber under these contracts and he said he *tried to but could not get it because of the price. There was a disagreement as to the market price*, and witness could not say that Danebo refused to sell him lumber at the market price, but there was a question as to *what the market price was* (p. 115). Kincaide admitted he had a prior deal known as the Eclipse Lumber deal, and Vana was in on that same basis, and while the lumber was purchased from Kincaide in that deal the bills of lading ran direct from the mill to Vana, and Kincaide said that was customary (p. 116). Kincaide admitted that prior to the Eclipse deal, that all the deals he had with Vana were sold to him on a commission basis, and that Kincaide did not get into the wholesale business until O. P. A. established the amount that a wholesaler could charge and at that time the mills paid the commission (p. 117).

On cross-examination by Mr. Winters, Kincaide admitted that when he came to Omaha in July and talked to Mr. Vana about this deal, in which Mr. Vana gave him the check, to Mark C. Storms there was nothing said about $250.00 a share for part of the stock, nor that Vana was to get 490 shares, and that the Danebo Lumber Company was not mentioned because the name had not been set at that time, and he didn't recall definitely whether

he had even named Storms, nor did he mention the value of the stock to the other retail dealers who went into similar deals (p. 118). He told them there would be an option drawn and that this money would be put up as purchasing the option and for doing that they would get a certain amount of lumber from Kincaide, and when asked what was to become of the money that was put up in these units he said that was paid for purchasing these options; it went out of his control; that the option was drawn up in a bona fide way but the *general understanding was that the options would not be exercised* (p. 119), and that was taken for granted; and when asked what was said at the meeting at the Paxton Hotel by Kincaide he answered, *everybody was of the same opinion that the options were not to be exercised;* and that was true of the Eclipse deal and as a matter of fact in the Eclipse deal they sold out before the options had expired and refunded part of the money, and they refunded this money because the money that was put up had not been eaten up by the lumber sold. That was the general understanding (p. 120). He claimed that he could have gotten some lumber from the Danebo Lumber Company after the ceiling price went off, but he didn't try to get any before the ceiling price went off because the mill was not completed. He admitted that he told Vana and the others that the mill would be operating and could furnish lumber in ninety days, but that he didn't guarantee that. He admitted that this Danebo deal was the same kind of an option that he had with the Eclipse, along the same lines, and that he made similar options with the Douglas Fir Company afterwards, and he admitted that the Eclipse sold out before the exercise of these so-called options expired (p. 122); and at the bottom of page 123, Transcript of the Record, he was asked if this money that was put up

was put up for the purpose of paying the excess over the ceiling price, and he answered that the *dealers never figured that way because the lumber was sold at ceiling prices* and if *they were not going to exercise their options they would naturally figure that option money was part of their cost price*, and they could figure that out themselves.

Q. That was your understanding?

A. Certainly that is the way anybody would figure it out.

Q. If they didn't exercise their option?

A. That is the way it would look.

Q. You figured that all the time when you dealt with these options, *that they were options to evade the O. P. A.?*

A. *That was the extent of it.*

Q. And you said so in this circular you set out *November 27, 1946,* which you admitted in your deposition you sent out to all of them?

A. That is right, I admitted it.

Q. You told them to cover it up?

A. The purpose of that was so that they would not make any mistake and try to deduct the option money from their income tax, which might be questioned by the income tax people.

Q. You mean that it might be *an evasion of the O. P. A. ceiling price?*

A. *The same thing applies there.*

Q. You refer to in your letter, to these options, and suggest that *these options were evasions?*

A. *That is right.*

Q. You cautioned them to destroy the circulars?

A. I asked them to return them.

Q. And not keep a copy?

A. Because they were confidential, for their own protection as well as everybody else's. (p. 124)

Q. And for your protection?

A. That is right.

Q. Protection from what?

A. From what?

Q. O. P. A. prosecution? (p. 125)

Mr. Mark Storms, defendant, then testified that this deal first came up in the latter part of *June, 1946.* Mr. Kincaide was in the office of the Monroe Lumber Company and in the course of the conversation witness suggested that he had a mill site at Danebo Station and we were contemplating building a mill there if we could raise some money to do it with, and Kincaide wanted to know whether we would be interested in giving him an option on the output of the mill in return for raising money through *options on stock.* Witness told him that they would be interested and agreed that if he could raise $60,000.00 through some of these people in the middle west they would give him a contract on 80 per cent of the cut the first year, 70 per cent the second year and 60 the third (p. 127). Kincaide said that he thought that some of his people around Omaha would be interested in purchas-

ing options on the stock in order to raise the money. That conversation was some time *between the middle and last of June.* Around the first of August he reported back he had the money and was ready to sit down and draw the options. He said he had interested his people in options and had the money and was ready to sit down and draw a contract. Storms immediately incorporated the Danebo Lumber Company and Kincaide was in Seitz's office when the options were drawn up, and he suggested the number of shares to his different colleagues (p. 128). He gave us the idea that he had sold or broken them down into twelve units. That was the way he wanted the options drawn, and when asked how the purchase price of these options was arrived at, the price per share, he said that was set by the officers of the Danebo Lumber Company and based upon their past experience and ability in the lumber business, and after the options were completed and signed, the checks that Kincaide had, including the $15,000.00 check, were delivered to Storms and the options were delivered to Kincaide (p. 129), and the contract, Exhibit 1, was delivered at the same time to Kincaide (p. 130). As far as the options were concerned, the options were *drawn* in a bona fide way and on a bona fide basis, and the first I heard of any sham in regard to the options was when we met Mr. Winters the latter part of August, 1947 (p. 131). He states that he is ready and willing to perform the option and with reference to the contract he had with Kincaide he never refused to deliver any lumber on that contract (p. 123). He claims that he had no contract with Kincaide or the plaintiff or its representatives, other than expressed in those two contracts, Exhibits 1 and 2, that is, the option and the contract. He admitted that he never had any dealings with Mr. Vana or any of the rest of these op-

tionees directly, and he never gave to Kincaide any authority to negotiate any of these contracts, or any of these options with anyone. He did not give any authority to Kincaide or any other wholesaler (p. 132). He never authorized nor in any way suggested how these checks should be drawn (p. 133). None of the option holders ever exercised their options and he claimed that he was not to furnish lumber to any of these people, that he was dealing with Kincaide and Kincaide was not his agent in making these deals. He never had any authority to act as our agent. He said that he had clients in and around Omaha that he thought would be interested (p. 136), and he claimed that these options were bona fide. It was witness' version that he was selling all the stock of this corporation, giving options to sell it, and that he used all of this money to install and equip the mill, one hundred per cent, and in addition thereto put in some $60,000.00 of his own money, and the mill was not equipped in time to furnish lumber prior to *April 1, 1947* (p. 137). And he claimed that although these people advanced money so that he could build his mill and equip it to the full extent that was done, that there was no obligation to furnish them lumber, and that his contract was with Kincaide to furnish him lumber, and that he never had any dealing directly with plaintiff or any of these retail lumber dealers, nor did anyone else connected with the Danebo deal directly with them (p. 138). He admitted that he heard of the option method being used to evade the O. P. A. (p. 139), and when asked if he didn't know that the lumber that Kincaide was to receive under his contract was to be supplied by him to the persons holding the options in satisfaction of his obligation to furnish them lumber, he answered, "The idea was that we were to furnish lumber to him on his order," and then he was asked whether

he knew at that time that there were definite options totaling $60,000.00, if he didn't have any idea that the lumber he was to furnish Kincaide under this contract was to be furnished by him to these people who had the options and he said, "We had that idea, yes" (p. 140).

Then on cross-examination by Mr. Winters he was asked what was his idea in going ahead and getting money to finance this mill and then selling the stock out in options to someone else to take charge of it, and he stated his purpose was primarily to raise money to build the mill, and if the optioners saw fit to exercise their options that was up to them (p. 140). He then was asked why he would want to raise money to operate the mill, and then at the same time give options to sell all of the stock:

A. Primarily to raise money to equip the mill. They took their chances whether the options would be exercised.

Q. If this was a bona fide option you contemplated to build it and then the other people would take charge of it?

A. We didn't know. We drew the options so that they could exercise them, and they can still exercise them. (p. 141)

ARGUMENT

Appellants, in their argument beginning on page 14 of their brief, make the contention that the Court should have denied relief to appellee under what was designated as the Clean Hands doctrine, and that is that no suitor can invoke the aid of a Court of equity unless he comes into the Court with clean hands and that this rule applies regardless of how unclean the hands of the defendant may be, and they go on to say that in order to invoke the

maxim against a suitor it is, of course, essential that the Unclean Hands must relate to the subject matter upon which the cause of action is based.

With this general rule we have no controversy, but it is our contention that it is not applicable to the case at bar. We make the general statement that that rule applies solely to actions where the suit is brought to attempt to enforce or carry out the illegal contract or where it is brought to recover the money or property given under the illegal contract after it is fully executed. It is our contention that this suit was brought under neither of these theories.

This suit is founded upon the theory that the money paid down, which is sought to be recovered herein, was paid under an illegal contract; that the said contract was still executory; that no lumber was ever delivered under said alleged contract while OPA regulations were on, nor was any lumber delivered even after OPA regulations went off, which was some time in November, 1946. That the defendants got plaintiff's money, refused to deliver any lumber under the agreement, and refused to return the money advanced under said illegal contract; and that the plaintiff elected to rescind said contract on the ground that it was an illegal transaction before the illegal agreement was carried out, and both sides have abandoned the contract, and therefore we have the right to rescind and recover our money back upon two theories: **first,** that under the facts and circumstances as shown by the evidence we were not in pari delictor and were compelled on account of **economic coercion** to enter into this illegal contract, and we were therefore the least guilty of the parties to this agreement and could rescind and recover our money back.

Second. That even though we were in pari delicto, as the contract was not in violation of a law malum per se, but was only in violation of a statute, malum prohibitum, and the contract was still executory and the illegal part not carried out and fully executed under what is known as the Repentance Rule, either party to such an agreement may repudiate the illegal contract, rescind and recover back the amount paid thereunder.

Parties Were not in Pari Delicto

We will first discuss the question of whether or not the parties were in pari delicto.

The Court in its finding of facts did not pass upon the question as to whether or not the parties were in pari delicto, but found generally that the parties were engaged in a violation of the O. P. A. regulation and that the plaintiff paid money down under that violation and the defendants, Mark C. Storms and the Danebo Lumber Company, got their money and no lumber was ever delivered under said agreement, and under the Unjust Enrichment rule they would not have the right to keep our money, and judgment was rendered against the appellants for the amount that we paid down. Discussing the question now as to whether or not we were in pari delicto, we call the Court's attention first to the case of *Ring v. Spina,* 148 F. (2d) 647. That was a case where the plaintiff sued the defendant for treble damages under a contract which he alleged was in violation of the Sherman Anti-Trust Act. A temporary injunction was issued, restraining the defendants from violating the contract. From an order vacating the injunction plaintiff appealed, and the Court applied the principle that where one party to an illegal contract acts under duress of another the

parties are not in pari delicto. The defendants claimed that the plaintiff was not entitled to relief because he signed the basic agreement which, among other things, promised any of its members to lease or license a play; defendant limits contracts by both managers and authors to those made under its own terms, and they must be in good standing with the guild. It appears that plaintiff signed this agreement which was in violation of the Sherman Anti-Trust Act. The plaintiff was interested in the production of a play known as "The Stovepipe Hat," and he claims that he signed this restrictive agreement in violation of the Sherman Act *against his will* and under *coercive* pressure and rules and regulations of the guild, in order that he might protect his part in the venture. A dispute arose between the parties, as the defendants claimed that the plaintiff made changes in the play which breached the basic agreement above referred to, and they therefore terminated his contract. The play was forced to close, and therefore he sought this injunction and relief. The lower Court, in denying the motion for temporary injunction, stated that not enough facts had been furnished to indicate that the basic agreement was void under the Sherman Act, but it went further and held that the transaction there involved was not in interstate commerce and that relief should be denied since the parties were in pari delicto and since plaintiff was seeking at the same time to be awarded *rescission and enforcement* of a contract.

The Circuit Court held that this agreement was in violation of the Sherman Act. The evidence in the case showed that plaintiff had invested considerable money in the production of this play, taking over another party's production contract, and before he invested that money

he endeavored to enter into a direct contract with the authors. But he found that impossible until he, in turn, became a member of the guild in good standing by signing the basic agreement. The rules of the guild permitted no other course; thus he had to sign to save his $50,000.00 investment and to safeguard his future attempts to bring the venture to fruition. The Circuit Court then states that "this seems to us a prima facie showing of *economic coercion.*" In discussing this again the Court said (p. 652):

> "It is well settled that where one party to an illegal contract acts under the duress of another the parties are not in pari delicto, and in actions for treble damages under the Sherman Act a showing of economic duress similar to that asserted here has been held sufficient proof that the plaintiff is not a party to the monopoly." (Citing numerous cases.)

They go further then and say there appears to be a definite tendency to hold those not actively engaged in promoting monopoly to be the victims, rather than participants in anti-trust violations. Thus it is well settled that dealers and solicitors for a combination may sue as soon as they are dismissed and claim damages for such dismissal.

Quoting from Judge Chase in the case of *Connecticut Importing Co. v. Frankfort Distilleries,* one of the cases referred to above, 101 F. (2d) 79 (81):

> "This is not a suit in equity where the clean hands doctrine is applicable, but merely a suit on a special statute which takes no account of the conduct of the plaintiff prior to the time the cause of action arose."

We are not going as far as this case. We are not seeking to recover under any statute, nor seeking to re-

cover money paid after the contract is *completely executed,* nor are we attempting to enforce an illegal contract. On page 653 of this case, the Court makes a distinction between a victim, rather than a participant in an alleged conspiracy. This case acknowledges the general rule that where the parties have been actually and truly in pari delicto, the Court should leave them where it finds them. An examination of the cases cited supporting that rule will show that every case, such as the ones cited by appellants in this case, are cases where the parties seek to recover *on the contract after it is executed,* or where they are seeking to *enforce the provisions of the illegal contract,* and, of course, the Court will leave them where it finds them. Then this Court on the same page makes this statement:

> "But here even without a showing of economic coercion as the final step in forcing him to sign the Basic Agreement, plaintiff is precisely the type of individual whom the Sherman Act seeks to protect and considerations of public policy demand the court's intervention in behalf of such a person, even if technically he could be considered in pari delicto. Indeed this is a general principle applicable beyond the antitrust field."

Citing *Thomas v. City of Richmond,* 79 U. S. 349, 12 Wallace 349, which is one of the leading cases holding that we can recover the money paid under an illegal contract where it is executory and the illegal agreement is *not consummated.*

In *Johnson v. Harmon,* 328 Ill. App. 585, 66 N. E. Rep. (2nd) 498, the rule is laid down where parties to a contract against public policy or otherwise illegal are not in pari delicto or equally guilty, public policy is considered as advanced by allowing either the *least or the more* ex-

cusable of the two to sue for relief against the transaction, relief is given to him. The least guilty of two parties to an illegal transaction, especially where he has been fraudulently induced to become a party to the action, may recover what he has paid to the other party to the unlawful enterprise.

In *Council v. Cohen* (Mass.), 21 N. E. (2d) 967, the rule is laid down that courts will not aid in the enforcement, nor afford relief, against the evil consequences of an illegal or immoral contract, but where parties are not in equal fault as to illegal element of the contract or where there are elements of public policy more outraged by the conduct of one than of the other, then relief in equity may be granted to the less guilty. In tha case the owner had given a second mortgage in violation of the H. O. L. C., and they not only allowed them to rescind the contract, but went further and allowed them to recover the money paid with interest on the theory that they were not in pari delicto.

In *Badger Coal and Coke Company v. Sterling Midland Coal Company,* 180 Wis. 79, 192 N. W. 461, where the defendant, a wholesale seller of coal, while an order issued by the President under the Lever Act limiting the prices of coal was in force, dated orders taken by plaintiff back to a time before the executive order took effect, and exacted from him for coal so sold and delivered, an excess price, the plaintiff could recover the amount so unlawfully exacted, he not being in pari delicto with the defandant. The Court quoting with approval from 3rd Add. Con. (3rd Am. Add.) 520 as follows:

> "The law also implies a promise to refund money received under an illegal contract, where the plaintiff does not stand in pari delicto with the defendant. When contracts, for example, are prohibited by stat-

> ute, for the purpose of preventng one set of men from taking advantage of the necessities of others, and the money is paid upon such contracts by one of those whom the law intended to protect, the person who has so paid his money does not stand in pari delicto with the person who has received it, and may, after the *forbidden transaction is completed*, bring an action upon a promise implied by law from the person who has got the money, to *refund it.*"

And it is our contention, therefore, that under these authorities that we were not in pari delicto with the defendant. The uncontradicted evidence shows both by the plaintiff and the defendants that *lumber was hard to get.* That these retailers, including the plaintiff and all others as shown by the depositions, could not get lumber from the wholesalers or mill operatives *without paying over ceiling prices.* That they were ready and willing to buy lumber at O. P. A. ceiling prices, but they could not do so. That they were engaged in the retail lumber business and had to, if they wanted to remain in business, pay more than ceiling prices, and that they were, therefore, under *commercial coercion or duress,* and they were, therefore, the least guilty of the two parties to this illegal contract, and they were not in pari delicto, and under this theory were entitled to rescind the contracts and recover their money back.

Can Rescind Even if in Pari Delicto

Plaintiff could also rescind and recover his money back where the illegal contract *was not carried out and was abandoned,* and the leading case that we rely upon, as stated by appellants on page 52 of their brief, is *Spring Co. v. Knowlton,* 103 U. S. 49, decided October 1, 1880. Appellants seek to distinguish that case from the case at bar, first, on the ground that it was an action at law and

not in equity, but we will show as we go along that the rule that we are seeking to recover under applies as well *in equity* as it does in law. There Knowlton paid money on a subscription to the increase of the capital stock in violation of the statutes of New York. Knowlton paid the first installment and when the next installment became due, he refused to pay and the board by resolution forfeited the amount paid and cancelled his subscription. Knowlton wanted his money back and he sued to recover it, and appellants further state that it will be observed that the corporation abandoned the contract as well as Knowlton. It is our contention that there is no distinction between our case and the Knowlton case and the evidence here is overwhelming that *no lumber was ever delivered while the O. P. A. regulations were in force* because the lumber could not be obtained for the reason that the *mill was not completed until April 1, 1947,* and the overwhelming evidence of all of the witnesses is to that effect, as shown by the evidence set forth in this brief, that no lumber was ever delivered *thereafter* under this agreement that was made by plaintiff, under the agreement that the lumber was to begin to be shipped ninety days after the check was given by the plaintiff to Mr. Kincaide, and that was on July 20, 1946, and although repeated demands were made by the plaintiff for lumber, none was ever offered to be delivered at any price prior to April 1, 1947, according to all of the witnesses.

After April 1, 1947, no lumber was ever delivered under this agreement, which was that if the O. P. A. went off, then the lumber was to be delivered according to the market price as fixed by Weyerhaeuser and the Long-Bell Company; the lumber was to be invoiced at $10.00 to $12.00 *under the then market price,* and the other *$10.00 was to be taken out of the money advanced.*

Going back to the Knowlton case, the Supreme Court stated that it was conceded by the defendants in error that the plan adopted by the company to increase its stock was in violation of the law of New York and, therefore, void. Then the Court said:

> "We are then to consider whether upon the hypothesis that a plan for the increase of the stock was illegal, there can be recovery upon the facts of the case as found by the Circuit Court."

The Court in that case said there was no performance of the contract whatever *by the company* and *only a part performance by Knowlton* and that the making of the illegal contract was *malum prohibitum* and not *malum in se*, and the Court said there is no moral turpitude *in such a contract.* We contend that this expression that there is no moral turpitude in such a contract refers to *contracts that are just malum prohibitum* and not malum in se. The Court then goes on to say:

> "The question presented is, therefore, whether conceding said contract to be illegal, money paid by one of the parties in part performance can be recovered, the other party not having performed the contract or any part thereof, and both parties have abandoned the *illegal agreement* before it was consummated. We think the authorities sustain the affirmative of this proposition, and going over a book on contracts we quote the following: 'Where money has been paid upon an illegal contract, it is a general rule that if the contract be *executed,* and both parties are in pari delicto, neither of them can recover from the other the money so paid, but if the contract continues *executory* and the party paying the money be desirous of rescinding it, he may do so, by an action of indebitatus assumpsit, for money had and received.' And this distinction is taken in the books, that where the action is in affirmation of an illegal

contract, the object of which is to *enforce* the performance of an engagement prohibited by law, clearly such an action can in no case be maintained, but where the action proceeds in disaffirmance of such a contract and instead of attempting to enforce it presumes it to be void and seeks to prevent the defendant from retaining the benefit which he derives *from an unlawful act,* then it is consonant to the spirit and policy of the law that the plaintiff should recover. And citing Parsons on Contracts they approved the following: 'All contracts which provide that anything should be done which is distinctly prohibited by law or morality or public policy, are void, so he who advanced money in consideration of a promise or undertaking to do such a thing, may, at any time before it is done, rescind the contract, and prevent the thing from being done, and recover back his money.' The Supreme Court said that the views of the texts quoted are sustained by a vast array of authorities, both English and American. They approved the following from another case: 'If money is paid or goods delivered for an illegal purpose, the person who has so paid the money or delivered the goods may recover them back before the illegal purpose is carried out; but if he waits till the illegal purpose is carried out or if he seeks to enforce the illegal action, in neither case can he maintain an action.' This Court followed Thomas v. City of Richmond, 12 Wall. 349, to the effect that a recovery can be had as for money had and received when the illegality exists in the contract itself, and that contract is *not executed.* In such case there is a locus penitentiae; the delictum is not complete; the contract may be rescinded by either party. The Court goes on to say that this rule is aplied in a great number of cases, even when the parties to the illegal contract are in penitentiae delictum, *the question of which of the two parties is the more blameable is quite immaterial.* We therefore think the facts in this case present no obstacle to a recovery by

> Knowlton's administrators of the sum paid by him on the stock which has been subscribed for by Sheehan. In the first paragraph the record shows that Knowlton was an *active party in devising this scheme,* and it was claimed on that account by the plaintiff in error that he could not recover his money back."

Appellants say, page 53 of their brief, that Judge Harlan wrote a vigorous dissenting opinion. That is not true. In that dissenting opinion Judge Harlan did not express his own views upon the propositions of law discussed in the opinion of the Court, but he dissented solely upon the ground that as the State Court of New York, in the case of *Knowlton v. Congress and Empire Spring Company,* 57 N. Y. 517, had denied the right of recovery upon the facts set out in the Court's opinion, that their decision should have been accepted as the law of the case. Not only is that true, but in the case of *Parkersburg v. Brown,* 106 U. S. 487, where the city entered into an illegal contract and was the principal offender in issuing city bonds in violation of the municipal charter, the city bonds were held void, but that the purchaser of the bonds, relying on the illegal contract, as it was only in violation of the law *malum prohibtae,* following the *Spring v. Knowlton* case above, could recover his money, and Justice Harlan wrote that opinion.

This Knowlton case was approved in *McCutcheon v. Merz Capsule Co.,* 71 Fed. 787, 31 L. R. A. 415 (6th Cir.). It was a case where several corporations engaged in the manufacture of the same goods entered into an agreement by which it was provided that the parties should organize a corporation to manufacture the goods. That the stock of such corporation should be allotted to the several parties in certain proportions; that the parties should convey

all their property of every kind to the new corporation and receive therefor mortgage bonds of such corporation; each of the parties agreed not to engage thereafter in the manufacture of the goods. The new corporation was organized; the stock issued and conveyances of the property according to the agreement were made to such corporation, but it did not immediately take possession of the property of the Merz Company. While still in possession of its property the Mertz Company determined to withdraw from its engagements and so notified the officers of the new corporation, tendered back the stock and demanded a rescission of the contract. This was refused. Thereupon the Mertz Company filed its bill *in equity* to cancel the agreement and restrain interference with its property, and the new corporation filed a cross-bill demanding specific performance of the agreement. The Court held that these agreements forming part of one *plan* by which the Mertz Company was to abandon the exercise of its corporate powers and restrict itself to the holding of the stock of another corporation were *ultra vires and void,* and the Court held that as the agreement was still in part *executory* and had been promptly disaffirmed by the Mertz Company, the rule as to estoppel of parties in pari delicto did not apply, and cancellation of the agreement with an injunction against interference with the property of the Mertz Company might be granted, and dismissed the cross-appeal for specific performance. Judges Taft and Lurton, both Circuit Judges, took part in that decision, and Lurton wrote the opinion, both becoming members of the Supreme Court thereafter. The Court in that case (page 795) said undoubtedly if the parties are in pari delicto, and the contract has been *fully executed* on the part of the plaintiff, and *has not been repudiated by the defendant*, neither a Court of law nor equity

will lend its active assistance to the recovery of property or money paid on such contract or aid in bringing about its surrender or cancellation. The doctrine of the Courts applicable were stated aptly by Justice Gray in *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 145 U. S. 407, 12 Sup. Ct. 953, which is a case referred to by appellants in their brief on page 34. The extract referred to in the McCutcheon opinion, taken from the 145 C. S., is to the effect that equity or law will not aid a party to an illegal contract whether to enforce or set it aside, but if the contract is illegal affirmative relief against it will not be granted in law or in equity unless the contract remains executory or unless the parties are *considered not in equal fault*, as where the law violated is intended for the coercion of the one party and the protection of the other, or where there has been fraud or oppression on the part of the defendant. Quoting with approval *Thomas v. Richmond*, 12 Wall. 349 (355), and *Spring v. Knowlton*, 103 U. S. 49, and quoting further from the 145 U. S. to the effect that while an unlawful contract, the parties to which are in pari delicto, and it remains executory, its invalidity is a defense in a Court of law and a Court of equity will order its cancellation, only as an equitable mode of making that defense effectual and when necessary for that purpose. And in referring to the Clean Hands Rule attempted to be relied on by appellants in this case they say, that when the immediate and direct effect of an estoppel in equity against relief to a particular plaintiff might be to effectuate an unlawful object, or to defeat a legal prohibition, or to protect a fraud, such an estoppel may well be regarded as against public policy, and the Court in that case held the contract still executory and granted equitable relief against its enforcement, saying that there is an obvious distinction be-

tween the attitude of a complainant asking relief against an unexecuted agreement, illegal for reasons not appearing upon its face, and where it is sought to recover back money or property paid upon a contract fully executed. The Court said that the case of *Spring v. Knowlton,* 103 U. S. 49, is highly instructive and supports the proposition that affirmative relief may be extended to one of the parties in pari delicto, where the contract is unexecuted, and he be desirous of rescinding it, provided the contract was not one malum per se, and the injunction granting equitable relief and cancelling the illegal contract was affirmed.

That Justice Harlan did not disapprove the rule in the Knowlton case is evidenced by the case of *Block v. Darling,* 140 U. S. 234, 11 Sup. Ct. Rep. 832, where the plaintiff was sued to recover certain money which he alleged he had given to the defendant to hold on deposit, the defendant offered to show that the money claimed by the plaintiff to have been deposited with him, to be paid to him on his order, was so deposited with the intent to cheat and defraud his creditors. The Court excluded the evidence and Justice Harlan held that the evidence, if admitted, would not have relieved the defendant; that the plaintiff's suit to compel the return of the money may be regarded as one in disaffirmance of the arrangement under which defendants claimed to have received it, and if successful would tend to defeat the alleged purpose of defrauding his creditors by having it kept upon secret deposit with the defendants. It is not a suit to recover money received and paid out under an illegal or immoral contract which has been *fully executed.* The suit is necessarily a *disavowal* upon the part of the plaintiff of any purpose to hide this money from his creditors. To allow

the defendant to retain it upon the ground that he had originally the purpose to conceal it from his creditors would be inconsistent with the spirit and policy of the law. Citing as his sole authority, *Spring v. Knowlton,* 103 U. S. 49 (58), and authorities there cited.

In *Mueller v. Stoecker Cigar Company,* 89 Neb. 438, 131 N. W. 923, the Nebraska Court held that the contract for the purchase of a cigar store, where part of the goods and fixtures purchased consisted of a number of slot machines kept in use in the store for the purpose of gambling, is an illegal contract, and so long as the same remains executory, may be repudiated and rescinded, and the money paid thereon may be recovered back by the person paying the same, citing *Stover v. Flower,* 120 Ia. 514, 94 N. W. 1100, where the Iowa Court stated:

> "It is quite generally held that so long as an illegal contract remains executory and the illegal purpose has not been put in operation, the one who has paid the money thereon to the other party may repudiate the contract and recover back the money. This has been spoken of as the right of repentance." (Citing the *Spring v. Knowlton* Case, 103 U. S. 49; *Wasserman v. Sloss,* 117 Cal. 425, 49 Pac. 566, 38 L. R. A. 176, 59 Am. St. Rep. 209; *White v. Franklin Bank,* 22 Pick. 181; *Tyler v. Carlisle,* 79 Me. 210, 9 Atl. 356, 1 A. S. R. 301.

Citing, also, *Munns v. Donovan Commission Co.,* 91 N. W. 189, where the Iowa Court said:

> "If defendant was to make purchases on board of trade of commodities, with the intent that the difference between the contract and market prices be settled in money, and there should be no actual delivery of the property, the plaintiff and Cruzen had the right to repent of their wrongdoing and revoke

the authority given, at any time before the purchases were actually made. Having discovered the error of their ways, the law not only permits them to withdraw from the transaction, but extended to them a helping hand by offering the inducement of giving back to them that which they had parted with."

The Wasserman case in the 117 Cal. 425, 49 Pac. 566, 38 L. R. A. 176, 59 A. S. R. 209, just cited, is where a stockholder transferred his stock to the president of the corporation, which was to be used in corrupting certain persons in the renewal of leases held by the corporation of which the president was an officer, but such influence was not exercised, and the stockholder demanded a return of the stock before it was so used. The Court held that he could maintain such an action to recover it under the Repentance Rule. The Iowa case also cited *Barnard v. Taylor,* 23 Ore. 416, 31 Pac. 968, 37 A. S. R. 693, 18 L. R. A. 859, which case involved a suit to recover money that was put up on a bet. There the party who paid knew the race was fixed in advance and was a bogus race, in fact, it was designed so that he could recover money that he had lost in a prior bet, and the Court in that case held that even though it was an illegal contract and both parties were in pari delicto, still they had the right, before the illegal contract was carried out, to repent and recover the money back. That Oregon case cited with approval *Stansfield v. King,* 62 Kan. 801, 64 Pac. 614, in which case there was an illegal contract entered into to sell intoxicating liquor in violation of the prohibitionary liquor law, but before the deal was carried out the party who paid the money down to buy the liquor, rescinded the contract, and the Court held that under the repentence rule, that the money paid therein may be recovered back. This same rule was followed in Kansas in *Ware v. Spinney,* 76

Kan. 296, 13 L. R. A. (N. S.) 273, 9 Pac. 787, 13 Am. Cas. 1181. An early New York case is cited in several of these cases, that of *Morgan v. Groff,* 4th Barb. 524. where the Court held that money paid down on an illegal contract may be rescinded and recovered back, either in law or in equity.

In *Gehres v. Ater* (Ohio), 73 N. E. (2d) 513, the Supreme Court of Ohio, on May 21, 1947, held that at common law one may withdraw from a wager and retain or recover his property or money before it goes into the hands of the winner, even after the result of the wager is known and the loser may repudiate a wager and retain his money or property or recover it in a common law action, so long as title to the property has not passed to the winner. This is not a recognition of the illegal contract but a recognition of the right to repudiate it, and it applies even though a statute declares the gambling contract void. In that case the plaintiff deposited with the defendant a certain bond to secure the payment of the alleged debt for money lost in a gambling deal, and discussing this question the Court said (p. 517):

> "The broad principle that when parties enter into an illegal agreement, the courts regard them as *in pari delicto,* and consequently will leave them where they find them, affording no relief either in law or in equity, is subject to a number of exceptions, one of which is that where a contract prohibited by law is not malum in se, but malum prohibitum, and has not been fully executed, either party may rescind the contract and have relief in justice both in law and in *equity.* The principle upon which the exception is made is that the policy is best subserved by granting locus penetentiae to a party, and by permiting him to disaffirm the contract, prevent the execution of it,

and authorize the party so disaffirming to recover money paid or grant him equitable relief against the enforcement of the contract, the court again saying the courts allow a party, even though he is *in pari delicto,* repudiates the agreement while it is executory, to recovery whatever he has given thereunder, recovery being not under the agreement, but in disaffirmance of it on a promise implied or a right existing independently thereof. Accordingly it has been held in many cases that where the matters called for in the agreement that render it illegal, do not involve turpitude but are merely mala prohibita, either party, while it remains executory may disaffirm it on account of its illegality, and may recover money back or property that he has advanced under it."

Citing the *Spring v. Knowlton* case, 103 U. S. 49, and *Bernard v. Taylor,* 23 Ore. 416, cited above.

In another recent Ohio case, 70 N. E. (2d) 503 (Ohio), that of *Suburban Home Mortgage Co. v. Hopwood,* the mortgage company conveyed property to defendant's wife, as security for payment to defendant of a broker's commission, which could not be legally paid defendant because he was not a licensed real estate broker, and the property was to be re-conveyed if commission was not paid or completed sale not made. The Court first held that under this kind of an agreement, the company was precluded, under the clean hands doctrine, from recovering property so conveyed, since the transaction was one designed to circumvent the real estate broker's act. The suit was by the mortgage company against the defendant for an accounting of the monies received from the sale. However, on rehearing of this case, 73 N. E. (2d) 519, the Court stated that they had given the matter their most careful attention, and reached the conclusion that they carried the clean hands doctrine too far in not recogniz-

ing a distinction between illegal contracts based upon a consideration that is *malum prohibitum,* from those where it is *malum in se,* and that the former opinion correctly stated the law as to the latter, but not as to the former, and after quoting in detail the rules to be applied in the former situation, the Court on rehearing reached the conclusion that independent of any statute, as long as the illegal act remained wholly unexecuted, the party parting with his money, may repent, abandon his contract and recover back the money paid the object being to prevent wrong done, by encouraging such repentance and abandonment. The Court further held that to deny the plaintiff the right to recover under those circumstances would permit the defendant to collect for services which he had not performed, and for which in contemplation of the parties, he was not to be paid for. In that last case the opinion stressed the fact that the penalty was only on one side and the appellants make that point in their brief, but many of the cases seem to give that little consideration.

In a recent case in California, *Severance v. Knight-Counihan Company,* 29 Cal. (2d) 561, 177 Pac. 4, 172 A. L. R. 1107, it was held that an agreement between employer and employe, made at a time when the employers financial condition was unsound, and both parties were concerned with the possibility of further decrease in the employer's business, and the accumulation of further indebtedness, rendering the employer unable to pay the full amount thereof, giving the employe an option to purchase certain assets of the employer, at a price less than their actual value, is void as in fraud of the rights of future creditors, even though it may be admitted that creditors existing at the time of the agreement could have been sat-

isfied, and may not be enforced by the employe simply because the employe was less at fault than the employer. That was a suit to recover certain tariff plates or their value, in an action founded upon the alleged option agreement. In that case there was a penalty imposed on both sides, and the Court held under such circumstances it is absolutely void and unenforcible, irrespective of the comparative guilt of the parties, but they recognize the rule that if the parties are *not in pari delicto,* the party who was at fault can recover money paid under an executory contract, citing *McAllister v. Drepaeu,* 14 Cal. (2d) 102 (112), 92 Pac. (2d) 911, 125 A. L. R. 800. That case was a case involving an HOLC loan and the mortgagor was allowed to cancel the second mortgage and recover his money back, on the theory that he was only slightly at fault. They then go on to say "such relief is even granted to a party *equally at fault,* if he repudiates the contract before the illegal part of the bargain is executed." Citing the *Wasserman v. Sloss case,* 117 Cal. 425, above cited, and go on to say that the granting of relief, however, to one who repudiates an illegal contract is entirely different from granting to one who seeks to enforce it, and the Court will not enforce an illegal contract, merely because one party's fault was slighter than the other.

In *Colby v. Title Insurance Co.,* 160 Cal. 632, 117 Pac. 913 (916), 35 L. R. A. (N. S.) 813, the Court said:

> "It is true as a general rule, equity will not aid one party or another to an illegal transaction, where they stand *in pari delicto,* but will leave them just where it finds them to settle these questions without the aid of the Court, but this rule only applies where the parties are in pari delicto, where the illegal transaction is entered into voluntarily, and the turpitude of the parties is mutual. Where, however, the party

> seeking relief is not a free moral agent, and his consent to the illegal transaction is obtained through *duress,* he is not regarded as in pari delicto, and will not be precluded from invoking affirmative relief in equity."

In *Davis v. Green,* 91 N. J. Eq. 17 (19), 108 At. 772, it was held that the maxim—that he who comes into equity must come in with clean hands—is subject to well defined limitations. While the general rule is that where parties are in pari delicto no affirmative relief would be given to one against the other. That rule has always been regarded by courts of *equity,* as without controlling force in all cases in which public policy is considered advanced by allowing either party to sue for relief *against the transaction.*

In *Erwin v. Curie,* 171 N. Y. 409, 64 N. E. 162, 58 L. R. A. 830, the Court said:

> "After a very careful review of the authorities pointed out, where the contract is malum in se, thus involving moral turpitude, or violating some principle of public policy, the courts will in no case either free or relieve either party from any of its consequences. But when the contract is merely malum prohibitum, the court will interfere if the guilt rests chiefly upon one, although *both have participated in the illegal act.*"

In *Pullman's Car Co. v. Transportation Co.,* 171 U. S. 138 (150), the Supreme Court of the United States again laid down the rule that a person canot sue on an illegal contract, but can disaffirm, and is so permitted only because of the Court to do justice as far as possible to the one who has made payments or delivered property under a void agreement, which in justice he ought to recover

the value of the property, with interest, as the property cannot be returned. The suit is not maintained upon the unlawful contract, nor according to its terms, but on an implied contract by the defendant to return, or failing so to return, value of the property so delivered was allowed *with interest, not from the date of judgment but from the date of the delivery of the property,* January 1, 1885. That case referred to and approved *Spring v. Knowlton,* 103 U. S. 49.

The doctrine that the Courts will not aid a plaintiff who is in pari delicto with the defendant is not a rule of universal application. It is based on the principle that to give plaintiff relief in such a case would contravene public morals and impair the good of society. Therefore, the rule should not be applied in a case in which to withhold the relief would to a greater extent offend public morals.

There may be such an inequality of conditions between persons in pari delicto that relief may be given to the more innocent, if there are collateral and incidental circumstances attending the transaction and affecting the relations of the parties which render one of them comparatively free from fault, or where the Courts intervene from motives of public policy.

Hobbs v. Boatright, 195 Mo. 693, 93 S. W. 934, 113 A. S. R. 709, and extended note beginning at page 724.

Under this array of authorities there can be no question that appellee had the right to rescind and recover its money back, and the lower Court was right in so deciding.

Cases Cited by Appellants Distinguishable

Beginning on page 14 of appellants' brief and continuing clear through to page 57 of said brief, it is our contention that not a single case cited in all that brief denies our right to rescind and recover back the money paid.

Every case cited either involves the attempt to recover the money or property delivered under an illegal contract, after the contract is fully executed, or they are cases where a party to an illegal contract seeks to enforce the illegal contract or enjoin the other party from doing anything in violation of its terms.

We contend that the correct rule of law to be applied under those circumstances is to deny relief to either party under the doctrine of "clean hands."

Ford v. Casper, the first case cited, 42 Fed. Supp. 994, affirmed 128 Fed. 885, was an attempt to set aside a conveyance which was given to defeat creditors; thereafter the results sought for *were accomplished.* The plaintiff brought the action in equity to have the defendant declared a trustee for his benefit, and, of course, he could not do that.

In *Carolene Products Co. v. Evaporated Milk Assoc.,* 93 Fed. (2d) 202, next cited, the plaintiff sought an injunction against the defendant to restrain it from conspiring to injure or destroy the interstate trade of plaintiff contrary to the Sherman Anti-Trust Act, and he himself was engaged in violation of the Federal Filled Milk Act. All he sought to do there was to declare the Act unconstitutional. The Court held it was constitutional

and, of course, they did not aid him in enforcing the contract.

In *Mas v. Coca-Cola Bottling Co.,* 163 Fed. (2d) 505, plaintiff brought a suit against the company to be adjudged entitled to a design patent on a beverage bottle, claiming he had a patent on it. It developed he had forged documents and used perjured testimony with reference to obtaining the patent. Of course, he should be denied relief.

Keystone Drilling Co. v. General Excavating Co., 290 U. S. 240, was a suit to enforce an illegal contract, and not to disaffirm.

Preameau v. Cranfield, 193 Fed. 912, was a suit brought for an accounting under an illegal contract and a return of the money which he had sent for investment. Evidence shows they were engaged in a fraudulent sale of mining stock. The Court said it is no part of the Court's function to aid a party to a fraud or illegal scheme *in carrying it out, in adjusting the accounts or dividing its spoils.*

In *Smith, et al., v. Cal. Thorn Cordage Co.,* 129 Cal. App. 93, the plaintiff entered into a contract in violation of the laws of the State of California, to pool his stock so that the vote of the directors could be controlled. Thorn voted the stock, although he conveyed it illegally, and he claimed that the illegality allowed him to vote the stock. The other members brought suit to set aside the action of the stockholders at this meeting where Thorn voted the stock, and he filed a cross-bill asking the return of the stock. Of course, his relief was denied because the matter had been *fully executed.*

We have called the Court's attention to three California cases above which, when they pass on the question as involved here, that is the right to rescind, they uphold the right where the contract is *executory.*

The citation from Ruling Case Law, page 22, admits its exceptions to the general rule of clean hands, where there is a repudiation of the contract before *the execution of the unlawful purpose.*

The California case in the 109th, set out on page 22 of appellants' brief, does not involve the question here.

The quotation from 19 Am. Jur. (Equity), Sec. 471, page 325, simply states:

> "A court of equity will not adjust differences between wrongdoers, assist in the enforcement of an illegal or immoral contract, or lend its aid to the division of profits derived from such illegal contract or afford relief against the evil consequences thereof."

Ferryington v. Stucky, 165 Fed. Rep. 325 (8th Cir.). Plaintiff brought suit to enjoin the foreclosure of a trust deed on the ground that the consideration was against public policy and illegal. That suit, however, was seeking affirmative relief under the contract, and of course his right under that was denied.

We are not asking *affirmative relief* on our contract as discussed in that case, on the theory that we are less culpable.

That case admits that that rule is confined to violations of statutes, or to offenses in which the law violated is intended for the coercion of one party and the protection of the other.

The 22 Pick. 181 case involved also the *enforcement* of an illegal contract.

Camp v. Aetna Ins. Co., 68 A. L. R. 1169, cited, was an action brought to cancel an insurance policy in accordance with its terms, and if so cancelled the unearned portion of premium should be returned on surrender of the policy. The petition alleged that the company was cancelling it for an illegal or immoral purpose. The Court held that there was nothing in the proceeding contrary to law, and they sustained the general demurrer to plaintiff's petition, which sought to enjoin the cancellation of the fire insurance policy.

At top of page 30, appellants' brief, they cite *Jackson v. Baker,* 48 Ore. 155, 85 Pac. 512, as being a case in point, where the plaintiff paid the defendant the sum of $1,000.00 under an agreement whereby the defendant was to convey his homestead to plaintiff as soon as he obtained it from the Government, but the homestead was subsequently cancelled on the ground that it was not open to a homestead at that time. The plaintiff sought to recover the $1,000.00. The Court rightfully held that they did not give his money back because the illegal deal was *already consummated.* Plaintiff's counsel sought to distinguish that case on the ground that they were not in pari delicto, but the Court held they were; therefore, they would not return the money after the contract was fully executed.

In our brief we call your attention to the fact that the Oregon Court when a cancellation of the illegal contract is sought *before it was executed* held, in *Barnard v. Taylor,* 23 Ore. 416, 31 Pac. 968, 37 A. S. R. 693, 18

L. R. A. 859, that even where the parties are in pari delicto, following the leading case we rely upon, *Spring v. Knowlton,* 103 U. S. 49, they would allow rescission and recovery of the money back.

Appellants cite 12 Am. Jur., Contracts, Sec. 213, page 725, where it is stated:

> "The Courts will not enforce rights arising out of an executory illegal agreement, but even where it has been executed in whole or part by the payment of money, the Court will refuse to grant relief, unless, as will be seen, the former repudiates the agreement before the execution of the *unlawful purposes.*"

That is right in harmony with our contention and also the following:

> "Neither party to an agreement that has been *executed on both sides* will be aided in recovering back what he has parted with under the agreement."

Appellants rely (page 33 of brief) with a great deal of confidence on *Harriman v. No. Sur. Co.,* 197 U. S. 244, but an examination of that case will show that Harriman had assisted in organizing the Northern Surety Company, the purpose of which was to hold stock of several railroad companies, and he transferred to the Northern Surety Company large holdings of the Northern Pacific, taking in payment stock of the Surety Company. Thereafter Harriman brought the action to recover the stock, claiming the whole transaction was *illegal, ultra vires* and *void.* An examination of that case, however, will show that it was several years after this was done and after the illegal contract was *fully executed* that Harriman sought to get his stock back, and the Court said that the property delivered was under an *executed contract,* and therefore

could not be recovered back by any party in pari delicto, and that the Court could not relax the rule where the record disclosed no special considerations of equity, justice or public policy either to enforce it or set it aside. They admitted, however, in that opinion that if it had remained *executory,* or if the parties were considered *not in equal fault,* they would grant relief, citing *Thomas v. Richmond,* 12 Wall. 349 (355), and *Spring v. Knowlton,* 103 U. S. 49. Admitting that if it was still executory the parties could have rescinded, but they pointed out that no one made an attempt to rescind. Therefore, the Court did not aid Harriman after the contract was fully executed.

The same exception is pointed out in 145 U. S. 393, cited by appellants at pages 34 and 35, to the effect that if the contract is illegal affirmative relief against it will not be granted in law or in equity, *unless the contract remains executory or unless the parties are considered not in equal fault.* The very contention we are making here, and they go on to say:

> "When the parties are in pari delicto and a contract has been *fully executed* by plaintiff, and has not been repudiated by defendant, they will not aid the plaintiff to recover back property conveyed or the money paid."

As we pointed out in our brief, in *McCutcheon v. Mertz,* 71 Fed., that 145 U. S. case was referred to and the same distinction made, and *equity* cancelled the contract in that Mertz case, so that there is no lack of harmony in these cases at all.

Marshall v. Lovell, 11 Fed. (2d) 632 (page 35, brief), appellant claims is almost in toto in support of his posi-

tion, but there the record shows that after the illegal deal was *fully consummated* Marshall brought action to recover the money which he had paid. There the plaintiff sought to recover the *profits* of the deal on the theory that the case was only malum prohibitum, upon the grounds of public policy, the theory being that Lovell was in possession of a gain unlawfully acquired under a contract void ab initio. His right to recover the gain was denied.

They cite with approval the Harriman case, both of which cases are seeking to recover, one the gain and the other the property delivered after the contract was *fully executed.*

Referring to the affirmance of the Lovell case, 19 Fed. (2d) 751 (8th Cir.), it is claimed that the Circuit Court went further than the District Court's opinion. But at page 39 that Court seems to recognize the rule, where both have not either the same willingness and wrongful intent engaged in the same transaction, and are *not,* therefore, *equally blameworthy,* a Court of equity may in furtherance of jusitce and of a sound public policy aid the one who is comparatively more innocent, and may grant him affirmative relief, by cancelling an *executory contract,* by setting aside an *executed contract,* conveyance or transfer, by recovery back of money paid or property delivered. Such an equality of conditions exists so that relief may be given to the more innocent party, and one of them is influenced by *duress.*

Appellants referred to 14 Cal. 210 (212), page 41 of their brief, but that was a case where the parties sought relief under a fully *executed contract,* and we have shown

in our brief when a contract is executed, although illegal, California follows the *Spring v. Knowlton* case, 103 U. S. 49, and allows a cancellation and rescission of the contract and recovery of the money back.

Then appellant, on page 41, relies upon the recent case of *Precision Inst. Mfg. Co. v. Automotive Maintenance,* which he cites as 325 U. S. 893, 65 S. C. R. 993, which should be 324 U. S. 806, but that case is clearly distinguishable. It was brought to restrain the infringement of a patent, and the defense was that the plaintiff in procuring the patent had wrongfully claimed patent rights which it knew were fradulently procured, and he was the beneficiary of the wrongful act. Of course, the Court did not aid him in *carrying out* his illegal contract or *protecting him under it.*

Appellants state at page 43 of their brief that there is no question but what this action is based upon an unlawful contract. We submit that is not true. It is based on the repudiation of an illegal contract before the illegal part is carried out, and to rescind the contract, cancel it and recover the money back, which under all the authorities we have the right to do.

None of the other cases cited by the appellants are in point, but several of them seem to recognize the right that where one repudiates the contract before the execution of the unlawful purposes he can recover his money back, but no one can recover under a contract that has been executed on both sides, as equity will not aid them to recover what they have parted with under the contract.

Several cases are cited from Words and Phrases on the definition of Moral Turpitude, and appellants, at page

52 of their brief, seek to distinguish the *Spring v. Knowlton* case, to the effect that even though the illegality is based on the statute, that is malum prohibitum, if there is moral turpitude over that, that will defeat recovery. That case stated and held that there was no moral turpitude in such a contract, *clearly meaning one which is just malum prohibitum.*

Appellee's Answer to Claim That Judgment Is Not Supported by the Findings of Fact

At page 58 of appellants' brief, they claim under Rule 52, Federal Procedure, the Court is required to make Findings of Fact and Conclusions of Law, and direct the entry of judgment appropriate to the Findings of Fact.

That same rule provides that "the Circuit Court will not reverse the findings of fact unless the lower court's findings of fact are clearly erroneous. The following cases so hold.

Augustine v. Bowles (Cal.), 9 Cir., 149 Fed. 93.

Crowell v. Baker Oil Tools Co. (Cal.), 9 Cir., 153 Fed. (2d) 972.

Findings of Fact are not necessary on uncontested issues.

Fontes v. Porter (9 Cir.), 156 Fed. (2d) 950.

Rule 19 of this Circuit requires the record to be printed and confines the appeal to that part of the record that is printed.

At the outset we challenge the right of appellants to review this question, for the reason that they have not

printed the full record containing evidence upon which the Court based his findings of fact.

In the lower Court the appellants designated the complete record, but only designated part of the record in the appellate Court, and only printed part of the record. They left out all exhibits except 1, 2 and 3, and all depositions of Cooper and others referred to as Ex. 27, and Kincaide deposition taken below.

In *Sampsell v. Auches,* 108 Fed. (2d) (9 Cir.) 945, this Court commented on a record similar to this one, and the record on appeal quoted portions of the reporter's transcript, the dockets and exhibits covered by the stipulations between the parties, but none of the exhibits have been printed as parts of the record on appeal.

Your Honors held that under Rules 19 and 20, with relation to the printing of the record and briefs, only those parts of the record on appeal which are printed are to be considered by this Court. Under that Rule 19, Subdivision 9, provides that the Clerk shall print those parts only, and the Court will consider nothing but those parts of the record.

In that case, as in this, the appellees did not request any more record but we did write to Mr. Seitz, who represents appellants, and called his attention to the fact that he had not printed all the record, and he wrote back saying that he did not have to, as he designated only certain points to be raised, and in his opinion the record printed was sufficient to raise those questions. Therefore, we have already called his atention to our claim that in our opinion he cannot raise the question he now seeks to raise, that is, that the findings of fact are con-

trary to the evidence *because he has not printed all the record.*

In the opinion referred to above in the 108 Fed. (2d) 945, Your Honors state, that the appellees are not compelled to add to the record. He may do as he desires. Nothing in this record indicated he so desired. Indeed, Your Honors said, *it is quite immaterial to appellees, because if the record did not contain all the evidence there would be little chance of Your Honors correcting the* findings, *in case they were not supported by substantial evidence.* As here it is clearly shown that the printed record does not contain all the evidence, and the Clerk so certified to it. See his certificate, page 45, Transcript of Record.

Under these circumstances the above case is authority that you will not reverse the findings of the Court, because the complete record is not printed.

This is also the rule and also so held in *Metz v. National City Bank of Evansville,* 115 Fed. (2d) 65; Cer. denied, 311 U. S. 675, 61 S. C. R. 41.

Asst. Ind. Corp. v. Manning (9th Cir.), 107 Fed. (2d) 362.

Zander v. Lutheran Brotherhod of Minn., 157 Fed. (2d) 17 (8th Cir.).

Sublette v. Servel, 124 Fed. (2d) 516, where the Court said:

> "Where the record submitted to the Circuit Court of Appeals included only so much of the evidence as was designated by appellants for inclusion in the

> record, the Circuit Court of Appeals could not review the question as to whether the District Court's findings were clearly erroneous under the Federal Rules. District Court findings are presumed to be correct, and in absence of a proper record shown to contain all the evidence essential to detemine correctness of challenged findings, such findings cannot be questioned on review."

Citing with approval *Oriole Phonograph Co. v. K. C. Fabric Products Co.,* 34 Fed. (2d) 400, 401, and *Pratt v. Stout* (8th Cir.), 85 Fed. (2d) 172 (176). To the same effect see *Howard v. C., B. & Q. R. R. Co.,* 146 Fed. (2d) 316 (8th Cir.).

Under these authorities you can sustain the Court's findings of fact on the evidence in the record, as we contend that, as shown by the printed record, there is ample evidence to show that these option contracts were a sham and not to be enforced, and were mere evasions of the O. P. A. law and regulations thereunder, *but you cannot reverse that finding because the complete record is not printed.*

Were These Options Sham Contracts and Evasions of O. P. A.?

At the bottom of page 58 of appellants' brief they claim that the Court did not find that the options were a sham. He did not say that in so many words, but his finding that this transaction was an evasion of the O. P. A. must have been, of necessity, equivalent to a finding that they were a sham, because if they were valid options to purchase stock there would be no evasion of the O. P. A. and no occasion to cancel and rescind, as appellee requested and the Court granted.

Parol Evidence Is Admissible to Show Illegality of Contract

It is well settled that parol evidence is admissible to show that a contract in suit is illegal. The general rule which forbids the introduction of parol evidence to contradict, add to, or vary a written instrument does not extend to evidence offered to show that the contract was made in the furtherance of objects forbidden by statute, by common law, or by the general policy of the law.

Muskogee Land Co. v. Mullins, 165 Fed. 179, 16 Am. & Eng. Ann. Cases 387, and extended note beginning page 388.

In *Wilhite v. Roberts,* 4 Dana (Ky.) 172, the Court stated the reason for the above rule as follows:

> "No instrument is so sacred, when tinctured with illegality or fraud, as to raise it above the scrutiny of parol testimony. And indeed it would be highly impolitic that it should; for if this rule should prevail as applicable to illegal and vicious contracts, it would be an easy matter to place all contracts, however illegal or vicious, above the reach of the law. It would only be necessary for the parties, as is alleged in the case before the court, to have a secret, illegal understanding, and to introduce into a written contract, fair upon its face, stipulations that are legal, but highly penal, as a means to enforce a compliance with the terms of the secret illegal bargain. The arm of the law is not so short as to permit such evasions."

In *Paxton v. Popham,* 9 East. (Eng.) 416, the Court said:

> "Unless the obligor were permitted to contravene the condition of the bond by plea showing the truth of the transaction, a bond would be made a cover for every species of wickedness and illegality."

In *Russell v. DeGrand,* 15 Mass. 35, the reason was stated as follows:

> "If such evidence is not admissible, parties can always control the laws, by the terms of their contracts; and in order to defeat an illegal contract, it would be necessary that the parties should be weak enough to expose the illegality in the instrument they adopt for their security."

Parol Evidence Admissible to Show Real Purpose

Parol evidence is admissible to show the real purpose for which a contract was made, and that it was a mere sham and not to be carried out as a contract.

Burke v. Delaney, 153 U. S. 228, 14 S. C. R. 816.

Ware v. Allen, 128 U. S. 590, 9 S. C. R. 174.

Coffman v. Malone, 98 Neb. 819, 154 N. W. 726, L. R. A. 1917B 528, with note 263, on competency of parol evidence that contract valid on its face was not intended to create legal relations, but was executed as a sham.

Vincent v. Russell, 101 Ore. 672, 201 Pac. 433, 20 A. L. R. 431.

N. Y. Trust Co. v. Island Oil & Trans. Corp., 34 Fed. (2d) 655 (2d Cir.).

Felming v. Morrison, 187 Mass. 120, 72 N. E. 499.

In re Hicks & Sons, Inc., 82 Fed. (2d) 272 (2d Cir.); approved in *Pepper v. Litton,* 308 U. S. 295, 60 S. C. R. 238 (247).

Zell v. American Seeding Co., 138 Fed. (2d) 641.

Hallett v. Moore, 282 Mass. 380, 185 N. E. 474, 91 A. L. R. 572.

Porter, Admr., v. Gray, 158 Fed. (2d) 142 (9th Cir.), on oral evidence to show device to evade O. P. A. regulations.

Land Co. v. Mullens, 167 Fed. (8th Cir.) 179, 16 Ann. Cas. 387, and extended note.

Enterprise Frame & Novelty Co. v. Sherman, 185 Misc. 5, 49 N. Y. S. (2d) 860.

In *New York Trust Co. v. Island Oil & Trans. Co.,* 34 Fed. (2d) 655, a contract was entered into, the real purpose of which was to evade the Mexican law. In this case the Court held, it was always possible to show that the parties did not intend to perform what they said they would, for instance that the transaction was a joke, that it arose between relatives of a family which forbade it. That they were a sham which nobody did, and nobody advised could, understand to be more. Perhaps for this reason they were a fraud on the Mexican Government. But that as the evidence showed, notwithstanding that fraud was shown they were not to be enforced because the parties did not intend them to be, and if the Court was asked to intervene between them and give relief based upon the sham contract, the Court would refuse, but the Court could not raise an objection where none did otherwise exist, because both were concerned in a fraud upon a third. As compensation this would be fruitless; as law it creates an obligation ex turpi causa.

In *Burke v. Delaney,* 153 U. S. 228, 14 S. C. R. 816, it was held that where a paper purporting to be a promissory note is sued upon by the payee himself, the maker may show a parol agreement that the note was to be a binding obligation only upon a certain contingency which never happened.

Following *Ware v. Allen,* 128 U. S. 591 (595).

This Delaney case was followed in Nebraska in *Coffman v. Malone,* 98 Neb. 819, 154 N. W. 726, L. R. A.

1917B 263, where the Nebraska Court held that parol evidence is admissible to show that the parties to the suit had mutually agreed that a written contract, which plaintiff is seeking to enforce, was never to be performed, but was a mere sham executed for the purpose of influencing the conduct of a third person.

In *In re Hicks & Sons, Inc.,* 82 Fed. (2d) 277 (279), it was held that it is well settled that whatever the formal documentary evidence, the parties to a legal transaction may always show that they understood a purported contract not to bind them. It may for example be a joke or a *disguise to deceive others.* Citing 34 Fed. (2d) 655, above, and the Coffman-Malone case and others.

In *Porter, Admr. O. P. A., v. Gray,* 158 Fed. (2d) 442, this Circuit held that evidence was sufficient to establish that defendant had violated the O. P. A. Regulations by designating the payment received in excess of the mill selling price as commission for the service of procuring shingles, and to give out this scheme defendant established a so-called procurement under which the customer forwarded to defendant in advance of any shipment a remittance equal to the selling price of a carload of shingles, plus a fee of $100.00 per car. The defendant there did, as Kincaide did here, purchase the shingles on his own credit and countersigned any specific credit to whatever customer he wished, and paid for the car by drawing a check against the so-called agent's account, but he controlled the shipments, under his own petition. The defendant gave color to the transaction as though it was a bona fide employment, and he requested that the customer list him on his payroll as an employee and pay the social security accordingly, and the customers did so.

The Court held that this method was a *device to evade the maximum price regulations* of the O. P. A., and allowed the O. P. A. administrator to recover damages for the wrongful evasion.

Evidence of Similar Plans Admissible

Evidence of similar transactions showing a general plan or system of dealing is permissible to show the purpose or plan in the individual case.

N. Y. Life Mutual Ins. Co. v. Armstrong, 117 U. S. 591, 6 S. C. R. 877.

Yakima Valley Bank v. McAllister, 37 Wash. 566, 79 Pac. 1119, 107 A. S. R. 823, 20 Am. Jur., Sec. 303, page 281.

This above rule applies in civil cases as well as criminal cases.

Weiss v. U. S., 122 Fed. 665 (682).

It is our contention, therefore, that under these authorities and much more that could be furnished, we were entitled to show that these contracts, although purporting to be bona fide options to purchase stock in these corporations, were a mere sham and intended as an evasion of O. P. A. Regulations. That in order to establish that fact we could show that there was a general plan or scheme entered into by the defendants through their agent, Mr. Kincaide, to adopt this method of evading O. P. A. Regulations, and that they were never intended to be carried out as options. In fact, it would be absurd to think that they were. That Storms would invest $60,000.00 of his own in this and then give options covering every share of stock that there was in the corporation, including his own

and other stockholders, then intended to turn over to these people who had options.

The evidence shows that none of these options were ever exercised; that this was a plan also devised in a previous deal, which was known as the Eclipse Deal, in which the stock was divided up into these so-called options and lumber was furnished under that deal at over O. P. A. price, and even before the time given under the options had expired the company sold the business. This would hardly be consistent with the theory that they were bona fide options, and in fact the evidence shows that after Judge McColloch had warned the defendant, Kincaide, to tell the truth he went on the stand and admitted that all these options, which were all similar in form, were *never intended to be exercised* and *were designed as O. P. A. evasions.* To the same effect see *Zell v. Am. Seeding Co.*, 158 Fed. 641 (2r Cir.).

Discussion as to Whose Agent Kincaide Was

At page 59 of appellants' brief the argument is made that all the testimony introduced in evidence concerning the contract, relating entirely to conversations and agreements made between the defendant, Kincaide, and appellee and that there is no evidence to indicate that Mr. Storms or any representative of the Danebo Lumber Company participated in any way in these conversations. Therefore, there is no evidence to show or justify the claim that Kincaide was the agent of the appellants.

They further claim that they were not bound by the acts of Kincaide if he was not their agent or exceeded his authority, on the theory that the contract cannot be ratified by the principal unless the principal has full knowledge of what the agent did.

See discussion, page 64 of appellants' brief and following.

Again appellants are met by the proposition that they did not print all the record and, therefore, they cannot raise the question that the evidence does not show that Kincaide represented Storms and the company to be formed, as their agent. If they had printed Kincaide's deposition taken at the time of the pre-trial it would have disclosed that he testified that he was representing Mark C. Storms as well as himself, and that he had been sent down to see what kind of a deal he could make with reference to raising money for Storms to organize his new company.

If appellants had printed the depositions of Cooper and others, it would have disclosed that all of these deposition witnesses testified, as Vana testified, that Kincaide came to them, *not* as their agent, but with a proposiiton from the principal, that he represented that he could get them lumber if they would put up the money to help finance it, and while Storms pretended to testify that he had no knowledge of what Kincaide had represented, and that he did not intend to evade O. P. A. Regulations, he was very particular to limit that denial to the *Danebo Lumber Company.* He was asked if he hadn't made similar deals with Mr. Hoppe, one of the retail dealers, and he didn't deny that he had made a deal with Hoppe previously to pay over the O. P. A. price, but he said the *Danebo Lumber Company* had never done such a thing. However, had they printed Hoppe's testimony this record would have disclosed that Hoppe testified that he had made similar deals to this one with Mark C. Storms when he operated the Monroe Lumber Company, a company

Storms also controlled, but as that is not in the printed record it is again our contention that this Court will not review the Findings of Fact of the Court because the testimony is not all printed in the record.

Again the appellants cite numerous cases claiming that the representatives of an agent, who is not authorized to make the representations, do not bind the principal unless the principal ratifies them with full knowledge of the fact.

It is our contention that we are not interested in that matter, because those cases involve cases where you are seeking to hold the undisclosed principal *on the contract,* on the theory that as the principal has received the benefits of the deal he cannot escape the burdens.

It is our contention that does not avail the appellants anything, because first he has not printed all the record to show whose agent Kincaide was.

Second, Kincaide is either their agent or he is not; if he was their agent duly authorized to make the deal as he made it with Vana, then his principal would be bound. But if the principal claims that the contract that his agent made was beyond his authority, then the principal cannot claim and keep the benefits, which in this case was the cash he received under Kincaide's deal.

That this is true is established by the leading case of *National Bank & Loan Company v. Petrie,* 189 U. S. 423, 22 S. C. R. 512, which was a case where the bank had sold certain bonds and Petrie, the vendee, obtained judgment for the purchase money in the State Court, on the ground that the sale was obtained by *false representations of the*

president of the bank. The question of the want of authority of the president to make such representation was raised by the bank. The Supreme Court in that case held that the bank cannot assert the *want of authority of their agent,* the president, to make the deal and at the same time *retain the benefits;* that the bank must adopt the whole transaction or none of it.

The Court in that opinion said:

> "If the contract was illegal, and it was sought to be enforced the Court would leave the parties where they found them."

Citing *Pullman Palace Car Co. v. Central Trans. Co.*, 171 U. S. 138 (150), 18 S. C. R. 808. But it went on to say:

> "But a *person does not become an outlaw* and lose his rights by doing an illegal act. The right not to be led by fraud to change one's situation is anterior to and independent of the contract. The fraud is a tort." (Here in the case at bar the fraud, assuming Mark C. Storms' testimony to be true, would be Kincaide's misrepresentation to Vana and others that he was acting as agent for Storms.)

It is usual consequence that as between the parties the one who is defrauded has a right, if possible, to be restored to his former position. That right is not to be taken away because the consequence of its exercise would be the *undoing of a forbidden deed.* That is a consequence to which the law can have no objection, and the fraudulent party who authorizes might have been allowed to disclaim any different obligation from that which the other had been content, has lost his right to object, because he has brought about the other's consent by wrong. (Again quoting the Pullman-Palace Car case.)

They then go on to say:

"It is true that the fraud was perpetrated by an agent, and it is argued that he did not represent the bank for an illegal act, but unless this means that there was no sale as the answer and a part of the argument seem to suggest, in which case of course Petrie *must have his money back.* The answer is that if the bank relies upon the sale it must take it with the burden of the fraud; it must adopt the whole transaction or no part of it. It cannot affirm what is for its advantage and repudiate the rest."

Then the Court finishes up the opinion by stating:

"But when a right is claimed to repudiate it, referring to the illegal contract, the party who denies the right is the one who *relies upon the contract*, and that party must take it as it was made."

As we construe this opinion, it means (assuming that this Court can pass upon this question as to whether or not Kincaide was the agent or not, in view of the fact that all the record is not printed) that if Storms claimed that Kincaide had no authority from him or misrepresented his authority and Storms got our money by that unauthorized means, if he wants to repudiate Kincaide's contract he cannot hold the money because it was through Kincaide's deal that Storms got all the money from plaintiff. If, however, he wants to keep the money he cannot raise the question that Kincaide was not his agent and did not have authority to make the contract. As this Court suggested, if Kincaide had no authority to make the deal then Storms has no right to hold the money, on the theory, as the Court said, there was no sale.

The evidence, however, clearly shows that Kincaide and Storms got together some time in June, 1946, and

this plan was then devised, and that was before Kincaide came to interview this appellee, which was the following July, or came to any of the other retail lumber dealers that went in on the same deal. So that the evidence that is even *in the printed record* clearly establishes the fact that it was Kincaide and Storms who devised the plan and drew up the options. None of the retail lumber dealers ever saw the mill; it wasn't then in existence; they never made any offer as to the amount of the stock, the names of the stockholders, number of shares that they were to get, or the total price they were to pay.

All the evidence shows that that was set up between Storms and Kincaide in Mr. Seitz's office *after* Kincaide came back from getting the money from the appellees and other retail dealers.

This 183 U. S. was cited with approval in *Cook v. The Bank,* 144 Fed. (2d) 423, which involved options that were taken by the famous Van Sweringen Brothers to control the railroads of this country. Following this case, 189 U. S. 423, it was held that where one is defrauded by the wrongful act of another he has the right to be restored to his former position. *Jefferson Standard Life Ins. Co. v. Heddrick,* 27 S. E. (2d) 198 (202).

And in *Openheimer v. Bank,* 85 Fed. (2d) 582, again following the 189 U. S., it was held, where an agent of an undisclosed principal induces sale by fraud, the agent must account for the purchase price. If contract is rescinded and *so must the principal if he gets the money.*

Now, the evidence clearly shows, as the Court found here, that Storms got this money and that would make him responsible and he, therefore, would have no right to

turn it over to the Danebo Lumber Company after it was incorporated unless that was part of the agreement, and Kincaide represented Storms, and the Danebo Lumber Company, if the contract is rescinded on account of its illegality, is liable as well as Storms, because it has no right to keep our money on any theory of this case.

If Kincaide was not the agent of Storms and Danebo Lumber Company, and he was certainly not the agent of appellee, then there was no meeting of the minds on any contract and we should get our money back. The Court was therefore right in his decision on this point.

Respectfully submitted,

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Attorneys for Appellee.

No. 12163

IN THE

United States Court of Appeals

For the Ninth Circuit

o———o———o

KOUTSKY-BRENNAN-VANA COMPANY,
a Corporation,

Appellant,

vs.

DANEBO LUMBER COMPANY, INC., a Corporation, and MARK C. STORMS, Individually,

Appellees.

o———o———o

Upon Appeal from the United States District Court for the District of Oregon

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BRIEF ON CROSS-APPEAL

o———o———o

ISSUE INVOLVED IN THIS CROSS-APPEAL

On page 43, Transcript of Record, the plaintiffs below served a notice of appeal, which notified the appellees that the plaintiff cross-appealed from that part of the formal judgment and decree entered on the 2nd day of December, 1948, in favor of plaintiff and against the defendant in the amount of $15,000.00, which denied plaintiff interest on said sum from the date prayed for by the

plaintiff in its petition, to-wit, October 19, 1946, to the date of the entry of said judgment, claiming that interest should be allowed for that period at the rate of 6 per cent per annum, as part of the damages suffered by the plaintiff for the wrongful withholding of the amount of the judgment referred to.

The cross-appellant claims that it should be allowed interest as fixed by the law of the State of Oregon, where this case was tried, from the time that the evidence showed the appellees wrongfully withheld said money. Therefore, assign as error now,

That the Court erred in not allowing us this interest.

ISSUE INVOLVED

The date fixed in this notice of appeal, October 19, 1946, was the date that Kincaide told plaintiff that the shipments would begin, and perhaps that is too early a date in which to allow interest, and that a later date should be fixed, May 26, 1947, which was the date the uncontradicted evidence shows that the plaintiff demanded the return of its money at a meeting in the Paxton Hotel, Omaha, Nebraska.

As shown by the evidence referred to in the original brief, such a demand was made, and Kincaide got in touch with the defendants and notified the plaintiff and others that they would not return the money nor would they deliver lumber at the market price fixed by the Weyerhauser and Long-Bell Lumber Companies, and give credit on said purchases out of the $15,000.00 that was advanced for the purpose of purchasing lumber.

The evidence also shows that on August 26, 1947, a notice (Ex. 8, p. 28, Tr. of Record) was given to the de-

fendant, demanding the money back and rescinding the illegal contract. That demand was refused, as shown by admissions in the pleadings and in the pre-trial order and in the evidence of the witnesses at the trial, all set out in the briefs in the appeal by the Danebo Lumber Company and Mark C. Storms.

EVIDENCE

The uncontradicted evidence set forth in the brief heretofore filed shows that the defendants got our money on July 20, 1946; that they were to deliver us the lumber beginning in ninety (90) days; and that they have never given us any lumber while the O. P. A. was in force, and the O. P. A. expired in November, 1946. That they have absolutely refused to give any lumber under the agreement under which the money was advanced and, therefore, they converted said money to their own use, certainly at least as early as May, 1947.

PROPOSITIONS OF LAW

It is our contention, therefore, that this amounted to a conversion of our property, and the amount is definite, and therefore we should have interest at the rate of 6 per cent, the amount fixed by the Oregon statutes, in the nature of damages for the wrongful withholding of our money.

The following cases sustain our right to that interest and hold that it is an abuse of discretion not to allow the interest.

Interest allowed under Oregon statute:

Public Market v. City of Portland, 171 Ore. 522, 130 Pac. (2d) 624, 138 Pac. (2d) 916.

Kem v. Fletcher, 174 Ore. 87, 147 Pac. (2d) 498.

Tracy v. Pioneer Trust Company, 175 Ore. 28, 149 Pac. (2d) 986, 151 Pac. (2d) 459 (9th Cir.).

Northern Pacific Railway Co. v. Twohy Bros., 95 Fed. (2d) 220 (227); Cert. Den., 304 U. S. 575.

The following cases hold that interest should be allowed where the amount is definitely ascertained at the rate fixed in the state where the Federal Court case is tried, from the date of the conversion or wrongful withholding:

National Car Loading Corp. v. Atchison, Topeka & Santa Fe R. R. (9th Cir.), 150 Fed. (2d) 210.

Miller v. Robertson, 266 U. S. 243, 45 S. C. R. 73.

Concordia Ins. Co. v. School District, 282 U. S. 545, 51 S. C. R. 275.

Klaxon Co. v. Stentor Electric Co., 313 U. S. 487, 61 S. C. R. 1020.

Jones v. U. S., 258 U. S. 40, 42 S. C. R. 218.

Rogers v. U. S., 158 Fed. R. (2d) 835 (2d Cir.).

Federal Surety Co. v. Bentley & Sons, 51 Fed. (2d) 24, 78 A. L. R. 1041, and note, page 1047.

Funkhauser v. Preston Co., 290 U. S. 163 (168), 54 S. C. R. 134 (136).

Royal Ind. Co. v. U. S., 313 U. S. 289 (295), 61 S. C. R. 995 (997).

Steingut v. Guarantee Ind. Co. of N. Y., 161 Fed. (2d) 571.

Cahan v. Empire Trust Co. (2d Cir.), 9 Fed. (2d) 713 (719).

Simecek v. U. S. Natl. Bk., 91 Fed. (2d) 214 (8th Cir.).

Intermila v. Perkins, 205 Fed. 603 (9th Cir.); Cer. Den., 231 U. S. 759.

Barnett v. Cobb, 140 Wash. 372, 250 Pac. 57.

Herman v. Golden Arrow Dairy Co., Inc., 191 Wash. 582, 71 Pac. (2d 581.

Pullman's Car Co. v. Transportation Co., 171 U. S. 151, 18 S. C. R. 808.

Brooklyn Savings Bank v. O'Neil, 324 U. S. 697 (714-716), 65 S. C. R. 895 (905-907).

ARGUMENT

It is the contention of this cross-appellant that where the amount sought to be recovered is definite and has been wrongfully withheld from a definite time, the Court should allow interest from the time that said money was wrongfully withheld or converted by the defendants, with interest at the rate fixed by the state statute in which the Federal case was tried, and that it is an abuse of discretion for the Court not to allow such interest.

In *T. & M. Trans. Co. v. Shattuck Chemical Co.,* 158 Fed. (2d) 909 (10th Cir.), it was held that where jurisdiction of a Federal Court is based on diverse citizenship, and the nature of the action is for money due on account and interest is not fixed in some binding manner, the law of the state is to be applied in respect to the allowance of interest, and the interest on the amount sought to recover should be allowed from the date when the over-charges, which was involved in that law suit, took place. In that case the lower Court only allowed interest for the amount of the over-charges *from the date of the judgment,* and the appellate Court held this was error and modified the judgment by the allowance of interest on over-charges

from the dates on which they occurred and, as modified, affirmed. At page 910 of the Federal Reporter they stated that the rule in diversity cases was that the law of the state was to be applied in respect to the allowance of interest, citing with approval *Jones v. Foster* (4th Cir.), 70 Fed. (2d) 200. They further stated that even where there is an action that is not a diversity action, interest on over-charges should be allowed on general principle even without regard to the local law, some with reference to the local law and others without. Citing *National Car Loading Corp. v. Atchison, Topeka & Santa Fe R. R.* (9th Cir.), 150 Fed. (2d) 210, cited above. And *Arkadelphia Milling Co. v. St. Louis So. Western Ry. Co.*, 249 U. S. 134, 39 S. C. R. 237. *Louisville & Nashville Ry. Co. v. Sloss-Sheffield Steel & Iron Co.*, 269 U. S. 217, 46 S. C. R. 73.

The Shattuck case concluded on general principle that interest should have been allowed on the several undercharges from the respective dates on which they occurred, the judgment was modified so as to allow interest.

In *Stiengut v. Guarantee Ind. of N. Y.*, 161 Fed. (2d) 571, interest was allowed as damages as a matter of law on conversion from the date of the conversion, and followed *Cahan v. Empire Trust Co.* (2d Cir.), 9 Fed. (2d) 713 (719).

Even before the Federal Rules, interest was allowed as damages for delay in payment, applying the state statute.

Royal Ind. Co. v. U. S., 313 U. S. 289 (295), where such interest was even allowed on unliquidated damages where the amount was easily ascertainable.

In *Funkhauser v. Preston Co.,* 290 U. S. 163, 54 S. C. R. 134.

In *Intermela v. Perkins* (9th Cir.), 205 Fed. 603, this Court held that in a suit against a city treasurer for a breach of his official duty that the liability of a treasurer arises by the reason of his refusal to discharge his official duty toward the plaintiff and sounds in damages, the measure of which is the amount of the warrant, with accumulated interest from the time his liability becomes fixed.

In *Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U. S. 487, 61 S. C. R. 1029, it was held that the state law of Delaware, where the case was tried, governed, rather than the state of New York with reference to the recovery of interest. There the Court held that the statute of state of forum controls and (now Rules) that interest should be allowed on the judgment from its date at the rate fixed in the state where the case was tried *did not exclude the allowance previous to the judgment,* and as the state statute allowed interest from the time of the wrongful withholding of the money, and where as in the Klaxon case, the right to recover interest as damages is in no way related to the validity of the contract, but *merely as an incidental item of damages,* interest with respect to which Courts at the forum, have commonly been free to apply their own or some other law, as they see fit. That the rule in Delaware should apply rather than the rule in New York, where the contract arose.

In *Fidelity Surety Co. v. Bentley & Sons* (6th Cir.), 51 Fed. Rep. (2d) 24, that case held that when necessary to arrive at fair compensation the Court, in exercise of sound discretion, may include interest or equivalent, as

element of damage where the interest is not specified in the contract, but awarded merely for damages for breach, rate of interest should be computed according to the law of the state where the Court which rendered the judgment is located.

That case is also found in the 78 A. L. R. 1041 and there is a note attached, beginning at page 1047, discussing the question as to whether the law of the forum or contract as governing the right to and the rate of interest as damages for delay in payment of money or discharge of other obligations, and the cases pro and con are given. But that annotation shows there is a diversity of opinion and was decided before the new rule, and before the Erie-Tompkins case, which now requires the Federal Court to follow the state law. It clearly shows that the provisions with reference to what rate shall control as to judgments was in dispute, and that the reason why the rule now provides that judgment shall draw the same rate of interest from its date, that the state law provides in the state where the case was tried, was to bring about uniformity of decision in the Federal Courts. This does not mean that you cannot allow interest before that date. All the cases cited from Oregon, above, show that the Oregon law allows interest for money wrongfully held in the nature of damages from the date of the wrongful withholding or conversion.

In *Northern Pacific Ry. Co. v. Twohy Bros.*, 95 Fed. (2d) 220, this very Court held that where money has been due and there has been a breach of contract, express or implied, to pay it, damages are recoverable for non-payment and the interest is upon the amount of damage from date of conversion. (Citing the Oregon statute.)

On page 26 of said Federal Reporter it is stated:

> "It has sometimes been loosely stated that interest will not be allowed in Oregon upon damages for breach of contract. This statement is contrary to the statute providing for interest at the rate of 6% per annum on all moneys *after the same becomes due.*"

The lower Court refused to allow interest before judgment, and this Court modified the judgment to include interest at the rate of 6 per cent per annum from February 1, 1928. That was on unliquidated damages, and here the amount is definitely known from the very start, and the reason that some Courts did not allow interest on unliquidated damages does not apply and interest should have been allowed.

In *Miller v. Robertson,* 266 U. S. 243, 45 S. C. R. 73, it was held:

> "One who has had the use of money owing to another justly may be required both in law and *in equity* to pay interest from the time payment should have been made."

And they even held that although generally interest is not allowed on unliquidated damages but when necessary to arrive at fair compensation, the Court in the exercise of sound discretion may include interest, stating, page 78 of the Reporter, that "one who has had the use of money owing to another justly may be required to pay interest from the time the payment should have been made. Both in law and in equity interest is allowed on money due." Following *Spaulding v. Mason,* 161 U. S. 375 (396), 16 S. C. R. 592.

In *Jones v. U. S.,* 258 U. S. 40, 42 S. C. R. 218, it was held:

"In tort actions the usual rule is to leave the question of interest to the jury, but that since the discretion of the jury as to the allowance of interest in tort cases *does not mean a right to gratify a whim or personal fancy,* there would seem to be the same reason for allowing interest and depriving an owner of property of an ascertainable value as where there has been a misappropriation of money."

In *Concordia Ins. Co. of Milwaukee v. School Dist.,* 282 U. S. 545, 51 S. C. R. 1930, interest was allowed on the amount recovered upon a fire policy even though the claim was unliquidated, the interest being included as equivalent to damages, were necessary to arrive at fair compensation. Following *Miller v. Robertson,* 266 U. S. 243, 45 S. C. R. 73.

In *Central Comm. Co. v. Jones Dusbury,* 251 Fed. 13 (7th Cir.), it was held that in assumpsit for damages for failure to take and pay for property purchased, it was permissible to include in the damages the loss of the re-sale of the property purchased, and the interest for the purpose for fixing the amount in controversy so as to give the Federal Court jurisdiction. Following the leading case in the Supreme Court of the United States, *Brown v. Webster,* 156 U. S. 328, 15 S. C. R. 377, where Chief Justice White held, where the suit was for the sale and eviction from certain premises by reason of the failure of title, that the point was made that under the law of the state in which the land was situated damages in case of eviction were limited to the return of the purchase price with interest thereon, which could not exceed $2,000.00 and consequently fell short of the jurisdictional amount. Chief Justice White said:

"This contention overlooks the elementary distinction between interest as such and the use of an

interest calculation as an instrumentality in arriving at the *amount of damages* to be awarded on the principal demand. As we have said, the recovery sought was not the price and interest thereon, but the sum of the damages resulting from eviction. All such damage was, therefore, the principal demand in controversy, although interest, and price, and other things may have constituted some of the elements entering into the legal unit, the damage to which the party was entitled to recover."

The Court further held:

"The entire damage claimed was the principal demand, and that the constitutional provision, excluding interest, to determine the amount in controversy was not applicable to interest, which was awarded as damage for the wrongful withholding of money."

In *Pullman's Car Co. v. Central Transportation Co.*, 171 U. S. 151, 18 S. C. R. 808, interest on a rescinded illegal contract was allowed from date of wrongful withholding.

We, therefore, contend that under these authorities it was an abuse of discretion on the part of the Court to refuse to allow us interest from the date, at least May 26, 1947, when all parties agree that a demand was made for the return of the money and that demand was refused.

Therefore, the cause should be modified so as to include interest at the rate of 6 per cent from May 26, 1947.

Respectfully submitted,

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